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No._____

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. GRIFFIN, The Mayor, and THE COMMON COUNCIL OF THE CITY OF BUFFALO, NEW YORK,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK; COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, *ET AL.*,
Respondents,

and

GEORGE ARTHUR, *ET AL.*; and the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. May a Federal court constitutionally direct a City to appropriate additional funds for its School Board under the "guise" of desegregation expenses, and *avoid* making Findings identifying particular items required for desegregation, by holding that under School Board's extravagant "voluntary" desegregation plan designed to "entice" suburban students into City District, "*every dollar*" of its $156 Million budget "is required for desegregation?"

2. Did Federal court unconstitutionally usurp New York State's Budgeting process, when it imposed additional taxes on its Citizens without Findings of particular desegregation necessity?

3. May Federal court constitutionally direct a City to appropriate $7.4 Million additional funds to its School Board for claimed desegregation expenses, where that sum was picked out-of-the-air by School Board's Trial Counsel, and NAACP plaintiffs-respondents claimed the funds were *not required* for desegregation, and *requested* reversal and remand?

4. Does the Second Circuit's decision conflict with the Eighth Circuit's order in *Liddell vs. Board of Education of the City of St. Louis, et al.*, (9/13/83) _____ F. 2d _____?

5. Was extravagant "voluntary" desegregation plan a *reverse* "interdistrict remedy" for an "intradistrict" violation contrary to *Swan vs. Charlotte-Mecklenburg Bd./Ed.*, 402 US 1, and *Milliken vs. Bradley*, 418 US 717?

The Parties in the Court Below

IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

Court of Appeals Docket No. 82-7690

GEORGE ARTHUR, NORMAN GOLDFARB, WILLIAM AND WILHELMINA P. SEALES, JOHN MEDIGE and THE CITIZENS COUNCIL FOR HUMAN RELATIONS, INC. and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, BUFFALO BRANCH,

Plaintiffs-Appellees,

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, LOURDES AGOSTO, individually and on behalf of her minor children Samuel Jose & Pable Agosto, Jr., ELSA CRUZ, individually and on behalf of her minor child Monic Cruz, ANNETTE Y. BROWN, as parent of JAMES C. SATTERWHITE, a child presently enrolled in the Buffalo City School System, as a trainable, mentally retarded student on behalf of herself and other parents of trainable, mentally retarded students in the City of Buffalo School System,

Plaintiffs-Intervenors-Appellees,

vs.

EWALD P. NYQUIST, Individually and as Commissioner of Education of the State of New York, THE BOARD OF REGENTS OF THE STATE OF NEW YORK, THOMAS M. BLACK, CARL H. PFORZHEIMER, JR., ALEXANDER J. ALLAN, JR., JOSEPH C. INDELICATO, M.C., KENNETH B. CLARK, HAROLD E. MEWCOMB, WILLARD A. GENRICH, EMLYN I. GRIFFITH, GENEVIEVE S. KLEIN, WILLIAM JOVANOVICH, MARY ALICE KENDALL, JORGE L. BATISTA, LOUISE E. YAVNER, MARTIN C. BARELL and LAURA BRADLEY CHODOS, Individually and as Members of the Board of Regents of the State of New York, JOSEPH MACH,

Individually and as Superintendent of the Schools of the City of Buffalo, EUGENE T. REVILLE, Individually and as Superintendent of Schools of the City of Buffalo, THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, FLORENCE E. BAUGH, SAMUEL E. SACCO, JOSEPH E. MURPHY, MOZELLA RICHARDSON, DR. MATT A. GAJEWSKI, LOUIS C. BENTON, MICHAEL J. RYAN, JOSEPH D. HILLERY and MARILYN P. KAVANAGH, Individually and as Members of the Board of Education of the City of Buffalo, JAMES D. GRIFFIN, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A. RAMUNNO, ANTHONY M. MASSIELLO, DANIEL J. HIGGINS and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants-Appellees,

JAMES D. GRIFFIN, Mayor of the City of Buffalo, and DELMAR L. MITCHELL, RAYMOND LEWANDOWSKI, GUS FRANCZYK, ALFREDA W. SLOMINSKI, WILLIAM J. DAURIA, JOSEPH S. FORMA, MICHAEL McCARTHY, WILLIAM B. HOYT, GEORGE K. ARTHUR, RICHARD F. OKONIEWSKI, HORACE C. JOHNSON, JOHN A RAMUNNO, ANTHONY M. MASIELLO, DANIEL J. HIGGINS, and WILLIAM A. PRICE, constituting the members of the COMMON COUNCIL OF THE CITY OF BUFFALO,

Defendants-Appellants.

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Opinions Below

The opinion dated July 22, 1983 of the United States Court of Appeals for the Second Circuit is reported at 712 F.2d 809, and is reproduced in Appendix (i) at page 1a.

The preliminary opinion dated June 30, 1982 of the United States District Court for the Western District of New York, per Curtin, Ch. J., setting a Hearing on the request for additional funds, is unreported; and is reproduced under Appendix (ii) at page 16a.

The opinion dated August 27, 1982 of the United States District Court for the Western District of New York, per Curtin, Ch. J., is reported at 547 F. Supp. 468; and is reproduced under Appendix (ii) at page 24a.

Jurisdictional Statement

The Judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated July 22, 1983, and was entered on the same day in the Office of the Clerk of said Court.

The Mandate was filed in the United States District Court for the Western District of New York on August 29, 1983.

No application was made by any party for rehearing by the Court of Appeals; and no order was granted respecting rehearing.

Jurisdiction is conferred on the Supreme Court of the United States to review the Judgment below of the United States Court of Appeals for the Second Circuit by Writ of Certiorari by Title 28 USCA §1254(1), and pursuant to Article III, §§1 & 2 of the Constitution of the United States.

Constitutional and Statutory Provisions Involved

FEDERAL RULES OF CIVIL PROCEDURE

"Rule 52. Findings by the Court

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. . ."

"Rule 65. Injunctions

* * *

"(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . ."

CONSTITUTIONAL PROVISIONS

"Article. I.

"Section. 1. All legislative Powers herein granted shall be vested in Congress of the United States, which shall consist of a Senate and a House of Representatives."

"Article. II.

"Section. 1. The executive Power shal' be vested in a President of the United States. . ."

"Article. III.

"Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . ."

"AMENDMENT [IX.]

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

"AMENDMENT [X.]

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"AMENDMENT [V.]

"No person shall b . . . deprived of life, liberty, or property without due process of law; . . ."

"AMENDMENT [XIV.]

"Section 1. ... No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATUTORY PROVISIONS

Education Law §2576

(reproduced under Appendix (v) at page 87a).

Buffalo City Charter §39 through 44

(reproduced under Appendix (v) at page 92a).

Statement of Case

This class action was commenced pursuant to Title 28 USCA §1343 in the United States District Court for the Western District of New York in 1973 and asserted Federal jurisdiction based on allegations that plaintiffs were deprived of their "equal protection" rights by alleged segregation in the Buffalo Public School System in violation of Constitution Amendment XIV §1 and Title 42 USCA §1983.

In 1976 the District Court held that the Buffalo Public School System had been intentionally segregated (415 F. Supp. 904). In 1978 the Court of Appeals for the Second Circuit affirmed that finding in part, and remanded in part (573 F.2d 134).

The proceeding is currently in the remedy phase. Several Remedial Orders have been issued. This appeal does not seek review of any of the District Court's remedial orders, each of which has been fully funded by Petitioners, and fully implemented by respondents.

Rather, this appeal seeks a restriction on respondents' extravagant expenditures made under the *false* claim, accepted by the District Court, and rejected by the

plaintiff NAACP, that "*everything* is necessary for desegregation," even though entirely unrelated to desegregation.

The case involves the basic question of whether the Board can assert that in a "voluntary" desegregation plan, every expense is "necessary" for desegregation.

Thus, the case is: *Does a District Court have unlimited requisition power over a City's tax revenues in order to finance school newspapers, clubs, swimming pools, wrestling teams, karate, and other frills, however luxurious and extravagant, and however actually unrelated to desegregation?*

Each of these expenses, and other expenses and programs that were unrelated to desegregation, could have been cut, modified, adjusted, or rebudgeted. However, the Board refused to make any cuts or rebudget—claiming that "everything is necessary for desegregation."

The District Court agreed. But it made no Findings of Fact, and the Court of Appeals failed to require it to make any Findings of Fact, that "everything is necessary for desegregation." There were no Findings that Petitioners' $7.4 Million increase in its 1982-83 appropriation to the Board was inadequate to enable the Board to carry out any, or all, of its desegregation mandates.

The NAACP plaintiff disagreed with the Board's position, and asserted before the Court of Appeals that respondent Board, and other Boards around the country, are "giving desegregation a bad name" by claiming that "everything is required for desegregation."

This appeal concerns the adequacy of Petitioners' $150,629,688 appropriation (composed of a $149.1 Operations & Maintenance or "O & M" Appropriation, and a $1.5 Capital Exempt Appropriation) to the Board for the 1982-83 School Year. The O & M Appropriation was $7.9 Million greater that Petitioners' O & M $142.2 appropriation to the Board for the prior 1981-82 School Year. This increase for 1982-83 was *many times greater,* actually over 3 times more, than the Board's documented increase in desegregation expenses for the 1982-83 School Year.

At the time respondents requested the additional funds, each remedial order issued by the District Court had been fully and timely carried out. All physical improvements required were installed and in place, and the Board was in "full compliance" with the Court's orders during the 1981-82 School Year, which ended June 30, 1982.

No new desegregation programs or expenditures had been ordered by the Court for the 1982-83 or subsequent School Year, and the Court was preparing to issue a final order ending the case.

This desegregation progress, and "full compliance," was accomplished by the Board with the appropriations theretofore provided by Petitioners under the City's democratic Legislative/Executive budgeting process, as mandated by New York Education Law §2576 and City Charter §39.

The latest order, filed on May 19, 1981, directed implementation of Phase IIIx (expedited) by September 1981. Phase IIIx established separate Early Childhood Centers (ECCs) for grades K (and pre-K) through 2, and separate Academies for grades 3 through 8, in different parts of the City.

Phase IIIx required the expenditure of substantial funds for construction and installation of the major physical improvements necessarily required to convert the normal schools to ECCs and Academies. Further, this had to be accomplished, and was accomplished, on an expedited basis in order to meet the Court's short deadline. It was all in place, and *all paid for,* prior to the start of the 1982-83 School Year involved herein.

The District Court had issued an order on August 14, 1981 which directed an additional appropriation of $1.987 Million ... in addition to Petitioners' original 1981-82 O & M appropriation of $139.7 Million for the 1981-82 School Year. The District's order of August 14, 1981 constituted its approval of the adequacy of the resulting total O & M appropriation of $142.7 Million to carry out its desegregation orders for the 1981-82 School Year.

The Board of Education not only completed the 1981-82 School Year in "full compliance," but it also "put-in-place," and implemented and carried out, Phase IIIx during 1981-82, and carried out all other desegregation orders that had been issued, and ended the year *with an admitted surplus,* the amount of which the District Court refused to inquire into (estimated at over $2 Million).

Thus, well prior to the commencement of the 1982-83 School Year before the Court, all Remedial Desegregation Orders, including the latest Phase IIIx order, had been fully funded by Petitioners, and fully implemented by respondents.

Respondents made no showing, and the District Court made no finding, that any remedial order had not been fully carried out within the Court imposed time limitations. Nor was there any finding that the Board was in anything but "full compliance."

The 1981-82 judicially approved O & M appropriation of $142.7 Million, less the Board's surplus for that year, was the logical starting point from which to determine the amount that the Board required for the 1982-83 School Year to carry out the desegregation orders of the Court. All that was required of the District Court was to add to this figure the increase in the Board's desegregation and mandated expenses for the next year.

This was simple enough, since the Board clearly stated its increased desegregation requirements for 1982-83. The School Board reported that it would require $2.1 Million additional for the 1982-83 School Year for the Board's entire "Basic Desegregation Program" (that is, everything but Phase IIIx), and that the Board would require an additional $0.3 Million ($328,476) for its Phase IIIx Program.

Thus, the Board stated it required only an increase in its 1981-82 appropriation, for desegregation purposes, of $2.4 Million. With Petitioners' $7.9 Million increase in the Board's appropriation for 1982-83, the Board had three times the increased funds it stated that it required to finance its increased desegregation expenses for 1982-83.

Even if the Board's $1.6 Million increased 1982-83 expenses for Handicapped students is taken into account, the Board's increased desegregation requirements for 1982-83 totaled $4.0 Million, or only 50% of Petitioners' 1982-83 increase in its appropriation.

The Board's request for $7.4 Million increased appropriation was actually never determined by a Board Resolution or Official Board Action. Rather, the $7.4 Million figure was arbitrarily selected by the Board's Trial Counsel on the eve of appearing in Court. The Board's Associate Superintendent of Schools and

Director of Finances testified that the $7.4 Million figure was selected by Trial Counsel, and it was admitted at the Hearing that it never had any Official Board sanction.

Nor was there any finding that the Board was unable to cut its non-desegregation expenses by more than enough to meet any other desegregation expenses that it might have for 1982-83. To the contrary, the evidence demonstrated that the Board had numerous areas in which it could effect cuts without affecting its desegregation Programs.

These areas of potential cuts included: the "frills" to *entice* suburban students into the District; cuts of up to 10% of the Board's $90 Million payroll made possible by the Board's Collective Bargaining contract provision permitting increases in class size when funds are not available; elimination of the Pre-K classes and All-Day K classes, which are a rarity in New York State Schools; realization of the savings from closing of two schools, and projected decrease of 1,185 pupils, for 1982-83; utilization of the Board's 1981-82 surplus the amount of which the Board refused to disclose; placing a hold on the Board's plans to upgrade its physical plant at a cost of approximately $3 Million; etc.

More importantly, it required no expertise for the District Court to find places in which to make cuts in the Board's request. Cuts of far more than the $7.4 Million requested increase could have readily been accomplished merely by implementing the Board's own expertly prepared lists of potential cuts which could be implemented if required. These included the Board's "contingency lists", *i.e.:* its list of $10.1 Million in "Projected Cuts;" and its "Page 1" list of $18 Million in Instructional Division Cuts (Appendix (iv) at pp. 81a-83a).

These "lists" of potential cuts represent the Board's own expert analysis of areas in which cuts could be made without interfering with any desegregation order of the Court. These cuts, which *would have been made by the Board* but for the intervention of the District Court, total more than $22.0 Million, or more than 3X the $7.4 Million additional appropriation directed by the District Court.

Reasons for Allowance of Writ

Thomas I. Atkins, Esq., who appeared for the Plaintiffs on the oral argument in the Court of Appeals, said in his brief:

> "There is no way at present to separate what is necessary for desegregation and what is necessary for education in the school system of the City of Buffalo." (Plaintiff's Brief at p. 12).

On the oral argument Mr. Atkins said that he could not defend the judgment and opinion of the District Court. We quote from the opinion of the Court of Appeals the following:

> "An unusual aspect of the case in its appellate stage is the position expressed at oral argument by counsel for the plaintiffs. Thomas I. Atkins, Esq., who has represented the National Association for the Advancement of Colored People (NAACP) in more than thirty school desegregation cases, declined to defend the District Court's order, though he had signed plaintiffs' brief urging affirmance. In his view the District Court had failed to make sufficiently detailed findings to permit a determination as to whether or not the full amount of $7.4 million in additional funding was needed. Perhaps reflecting more the institutional position of the NAACP than the litigating position of the plaintiff students, Atkins decried the attempts of school boards throughout the country, operating under desegregation decrees, to secure additional funding ostensibly but, in his view, not realistically

> needed to carry out court-ordered remedies. In Atkins' view, school boards were pursuing their private agendas of unmet educational needs, while those advancing the cause of school desegregation were incurring the communities wrath for the added financial burdens courts were imposing. The concern, doubtless advanced in complete good faith, is a serious one." (Appendix (i) at page 8a).

Mr. Atkins also told the Court that these practices were giving desegregation a "bad name".

The fact that according to Mr. Atkins the practice of school boards throughout the country operating under desegregation decrees are engaged in a similar practice to that of the respondent school board demonstrates the importance of this case.

The school board in this case sought a sum of $156.4 Million. The associate superintendent of schools, Dr. Claude Clapp, testified that "in preparing" his budget estimate; he received the assistance of the Board's "Budget Analysts" (A. 1081-2).[1] However, the Board's request to the Court was *not* based on the Board's Budget Analysts' recommended total Budget of $152.6 Million and O & M Budget of $150.5 Million (Exhibit 808-A. 1402, 1072-3), but, rather, on Counsel McCutcheon's instruction that the O & M request should be $156.5 Million (A. 1411)—or ***$6 Million greater*** than the Board's Budget Analysts' O & M Budget recommendation:

> "Q. Did you arrive at this $156.5 Million as a result of an instruction by Counsel on or about June 1, 1982, to prepare a rock bottom budget request?
> A. No, that was not the instruction I received.

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[1] A. references are to pages of the Joint Appendix before the Court of Appeals.

Q. What was his instruction?

A. The instruction I received was to prepare a document which would total $156 Million dollars.

Q. Who gave you the figure, Mr. McCutcheon?

A. The figure was developed—was really the *product of a discussion between Mr. McCutcheon and me.*" (A. 1080). (Emphasis added.)

The Court of Appeals' opinion is difficult to understand. The opinion departs from the oft-repeated rule in injunction cases, especially the mandatory injunction cases, which holds that the proof must be clear and convincing. Instead, the Court of Appeals stated that the proof in this case was "*marginally* sufficient for us to conclude that the Court acted within its discretion in ordering an additional appropriation of $7.4 Million . . ." (Emphasis added).

The Court made no findings of desegregation necessity to justify the mandatory injunction.

"Specially" stated and "specific" Findings of Fact were required to be made by the Court, both to FRCP Rule 52(a) and FRCP Rule 65(d), because this matter was tried to the Court without a jury, because it was a mandatory injunction.

FRCP Rule 52(a), entitled "Findings by the Court, Effect," required that the District Court "*specially* . . . set forth the *findings of fact* . . . which *constitute the grounds* of its action."

FRCP Rule 65(d), entitled "Injections., Form and Scope. . .," required that the District Court, in granting an injunction to "set forth *the reasons* for its issuance."

(See *Pasadena City Board of Education vs. Spangler*, 427 U.S. 424, 49 L. Ed. 2d 599).

The order made in the course of this ongoing school desegregation case "clearly granted a mandatory injunction". *Reed v. Cleveland Board of Education*, 581 F.2d 570; See also *Oliver v. Kalamazoo Board of Education*, 640 F. 2d 782, 787 (6th Cir. 1980).

The District Court made no computation or finding with respect to the amount of money needed in the 1982-3 school year to comply with any of the desegregation orders under which the School Board was operating (A. 1322). It had no evidence on which to do so because the Board had not made any such determination or computations. The Court simply said that:

> "It is evident from the record that the Board will need far more funds *to operate the schools* and carry on the court's desegregation order than it had available last year." (A. 1310; Emphasis supplied).

This is hard to explain since everyone admits that the Board was in full compliance with all desegregation orders in 1981-82, the year before (A. 249, 999, 1009-10). For 1982-83, the Board's requirements were less, since two schools had been closed, and the Board projected 1185 (2.5%) less pupils for 1982-83 (A. 1091, 1088, 136, 1368, 197, 311-2).

The District Judge did not identify which of several orders he may have had in mind, and nowhere did he rationalize or specify any amount required to comply with any desegregation order as distinguished from the amounts *otherwise required* to run the schools. He merely concluded:

> "The court finds that the Board has carried its burden of demonstrating that additional funds are required and that they are 'necessary to cure the effects of prior unconstitutional school segregation' " (A. 1310).

The District Judge made no finding as to the amount of additional funds required for desegregation (A. 1310, 1321-2, 1323). He cited *Oliver v. Kalamazoo Board of Education*, 640 F.2d 782, 787 (6th Cir. 1980), but in that case the court identified the order and the amount the defendant school board was directed to pay experts whom the court had appointed.

However, in the case at Bar, both the Circuit Court, and the District Judge ignored the rule of the cases that a *mandatory injunction* should not be granted where the plaintiff's proof is "meager and of a general character" (*Moor v. Texas and New Orleans Railroad Company*, 296 U.S. 101, 80 L.Ed. 509). The finding of the District Judge was limited to general order that the City "make available an additional $7,400,000 to the Board on or before June 30, 1983" (A. 1310).[1]

The meager and general character of the Board Superintendent Reville's testimony was as follows:

> "Q. Well, let me ask this then, does every dollar referred to in this budget request or estimate, this brown covered paper, relate to desegregation?
> A. Yes." (A. 954).

This was absurd, but it shows the character of the Board's thinking. The Superintendent then continued, as follows:

> "Q. Is every dollar mentioned in this budget estimate of yours for desegregation?
> A. Related to desegregation yes.

[1] He made no finding as to how much more money was required for desegregation *per se*, and overlooked the fact that the City was providing "far more funds" for the 1982-83 school year, *viz.*: $7,887,219 more than it had provided the year before (A. 127-8, 1220, 1391), and far more than the additional $2.4 Million the Board stated was necessary to carry on the existing and in-place desegregation programs (See Chart, Appendix (iv), p. 86a).

Q. All right. Then without desegregation what portion of it would you spend, what portion of the dollars mentioned in this budget estimate would you spend?

A. I don't know, because we are under desegregation orders, which encompasses the entire school system, so I don't know what money I would spend if it were—if we did not have a desegregation order or how we would spend it, perhaps that is a better answer, how we would spend it if there were not a desegregation order.

Q. Well, you would have to do some painting, wouldn't you?

A. Yes.

Q. You would have to do some plumbing?

A. Yes.

Q. That is in the absence of the desegregation order?

A. Yes.

Q. You would have to do—have some teachers, wouldn't you?

A. Yes.

Q. You would have to have some teachers aides?

A. Yes.

Q. You would have a whole host of expenses, would you not?

A. Yes.

Q. Hundreds of thousands of dollars of them, expenses, wouldn't you?

A. Yes.

Q. But you can't tell us what portion of this budget relates to desegregation and what portion of it would be necessary anyway in the absence of this desegregation order?

A. No. (A. 954-5).

At this point the District Judge shoud have applied his own pre-hearing ruling:

"... the burden shall be on the Board and the plaintiffs to show that the requested additional funds are 'necessary to cure the effects of prior

> unconstitutional school segregation.' *Oliver v. Kalamazoo Board of Education*, 640 F. 2d 782, 787 (6th Cir. 1980)." (See Appendix (ii), page 21a).

Instead, the District Judge ignored his own prehearing order as to the necessary standard of evidence that he would require before he would grant a mandatory injunction which would interfere with the City's legislative and executive functions.

Failure to link the request for funds to desegregation orders was fatal to jurisdiction.

The Board takes the position that since the desegregation was being attempted on a "voluntary" basis, *any* and *every* expense which might possibly be deemed to make attendance at the Buffalo schools more attractive to the children and their parents must be considered as "related" to desegregation (A. 247, 259, 348, 961). Under the Board's theory of the case, if it took busing in Rolls Royce cars to attract the children, so be it. If it took freshly painted schoolhouses to attract them, well and good (A. 259, 331).

The District Court was thinking clearly in its earlier decision of June 30, 1982 where it said:

> "With regard to the instant motion, the Board may be correct that it will be unable to provide adequate education to the students with the funds appropriated. But this is not a sufficient reason for court intervention." (Appendix (ii), p. 21a).

It was clear from the testimony that the Board increased its Budget Estimate as part of an attempt to "upgrade" the physical plant, and to decrease the pupil/teacher ratio, and that *this* accounted for the millions of dollars in increased funds which it requested (A. 348, 1364). Mr. Reville, the Superintendent of

Education, admitted that the Board was trying to upgrade the quality of education, and reduce the pupil/teacher ratio (A. 958-60, 348, 869, 942-3; *Cf.* A. 970-987).

"Separation of Powers" and "State's Rights" prohibit any direction to fund non-desegregational expenses.

The District Court in its preliminary June 30, 1982 decision said that only endeavors of desegregational necessity could justify the Court's intervention (A. 215). Why it changed its mind, and reversed itself in its August 27, 1982 decision, we do not know.

What we do know is that if a federal District Court is permitted so to interfere with the completed democratic budgetary process of a political subdivision of a State, there is no way to limit the expenditures it could order a municipality to make to its School Board.

Both the "Separation of Powers" concept of the Constitution (Articles I, II and III), and the "State's Rights Doctrine (Amendments IX and X), as well as Amendments V and XIV, Section 1, contra-indicate such interference, and prohibit an unjustified attempt to usurp a State's budgeting process (*Myers v. U.S.*, 272 U.S. 52).

Especially here, should the Court not have intervened. The budgeting process had been completed, the taxes spread, the tax bills sent out, and the taxes paid—all before the Court's intervention.

Even more so in this case, should the District Judge refrain from intervening where a palatable, and prearranged alternative exists—the Board negotiated an agreement with its teachers that class size could be increased if budgetary reasons require it (See Appendix (iv), p. 85a; R. 38—Ex. 23; A. 188-9).[3] A change of the

[3] R. references are to items of the Record on Appeal filed with the Court of Appeals.

pupil/teacher ratio from 15/1 to 16/1 could admittedly save $9 Million—or more than the $7.4 Million which the Court awarded—and there was no evidence that this would interfere with desegregation (A. 970-1, 1188-91, 978-87).

The School Board already was in "full compliance" with all desegregation orders.

The Board *concedes*, in fact asserts, that it was in compliance with the Court's orders with respect to desegregation for the school year 1981-82 (A. 249, 999, 1009-10). For the year 1981-82 the Board requested a budget of $159.8 Million, which it later agreed to reduce to $142,742,603, which included $2.1 Million added by stipulated order of the Court dated August 14, 1981 (A. 81, 131, 1296). This consisted of an O & M 1981-82 budget of $141,242,603.00 and capital exempt budget of $1,500,000.00 (A. 1391).

Moreover, the Board wound up with a surplus for the 1981-82 school year ended June 30, 1982, and set out to *eliminate* the surplus by transfers, by advance encumbrances, and by overpurchasing. Whatever, this 11th hour activity moved assets into 1982-83, and reduced its 1982-83 requirements (A. 1017-19, 1075-9, 1137, 1386).

Thus, the Board put desegregation programs into effect, and paid for them, in 1981-82, and ended with a surplus on an O & M Budget of $142.1 Million.

The District Court, by approving the August 14, 1981 settlement which added $1.987 Million to the Board's O & M Budget for 1981-82, *judicially approved the adequacy of the integration funding for 1981-82.* That the

Court's 1981-82 Budget was more than ample, was demonstrated by the large 1981-82 surplus, which the Board had to dissipate by transfers into 1982-83 (A. 1017-19, 1078-9, 1386; Exs. 810 & 799).[4]

The direction for additional funds ignored the threshold jurisdictional requirement of desegregational necessity.

A basic reason why the Board's application should not have been considered, and why the District Court lacked jurisdiction, is that the Board's own sworn estimates of its increased needs *to continue* existing integration programs in 1982-83 (Appendix (iv), pp. 69a-81a), were *substantially less* than the Board's needs in the previous year, 1981-82, when it had *to commence* certain of these integration programs (See 1981-82 application, Exhibit 821; A. 27).

The City's 1981-82 O & M appropriation (as increased by $1.987 Million by this Court's order of August 14, 1981 based on the stipulation of the parties) of $141,242,603, enabled the Board to meet *all* of the Court's integration orders (A. 249, 999, 1009, 1296, 218, 200, 106-11). The Board's increased requests for integration expenses for 1982-83 was only $2,412,723, or $3,983,673 including handicapped. *The Board's request for increased integration expenses, being far less than the*

[4] The extent of the surplus is unknown, but apparently substantial. The Board's May 30, 1982 unexpected balance was $24 Million (Ex. 799, A. 1386, 1078-9, 1017-9). The court refused to accept proof of the June 1982 transactions and final surplus balance (A. 1258-59). While Superintendent Reville testified that he did "not know" how much of this surplus was dissipated, he confirmed the fact that the Board did in fact take action in the latter part of May, and in June, 1982, to use up the surplus (A. 1017-9). The District Judge refused to consider evidence of this surplus when it became available after the close of the hearing, but well before his decision (A. 1084, 1261 (¶D), 1257-9, 1278; *Cf.* 1323).

City's $7.9 Million appropriation increase for 1982-83, was below the jurisdictional threshold for this Court's intervention. The Chart at page 86a of Appendix (iv) illustrates this lack of threshold jurisdictional findings.

For the year 1982-83, there were *no new* desegregation programs (A. 218, 200, 106-9, 111). Additionally, two schools had been closed and the pupil registration had declined by 2.5% or 1185 pupils less (A. 1091, 1088, 136, 197, 1368, 311-2). *Nevertheless, the Board, in preparing its budget estimates for 1982-83, did not take these decreases into account* (A. 1091, 1088, 182). Instead, it requested $162.5 Million, or $10 Million more than the Board's own Budget Analysts recommended for 1982-83 (A. 1067, 1402); and *$20 Million more* than its 1981-82 budget on which it realized a surplus.[8]

The City's appropriation for 1982-83 for the schools amounted to $150,629,822, or approximately $8 Million more than the 1981-82 budget of $142.7 Million. The Board admitted that the 1981-82 appropriation adequately funded all court-ordered desegregation programs. The 1982-83 appropriation was 92.8% of the Board's request, within the range that had been followed in previous years (Ex. 772; A. 448-9, 489). The Board's document "Trends in School Support" (Exhibit 805, A. 1391) demonstrated, and Dr. Clapp admitted that the School's percentage of City Revenues steadily increased from 1978 to date (A. 1060—plus $629,822).

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[8] For that matter, the Board never made a line or operating budget for the $156.5 Million which it requested from the Court—and, therefore, never really knew, and the Court was uninformed as to, exactly how much money, if any (especially considering the previous year's surplus), the Board actually required (A. 962-4, 1018-9, 1031).

For 1982-83, the Board's requirements for integration were fully met by the City's O & M appropriation of $149,129,822. *The reason for this was simple—the City appropriated $7.9 Million more to the Board for 1982-83, than it did for 1981-82, while the Board requested only $4 Million additional* ($2.4 Million additional if handicapped pupils are excluded) *for increased integration expenses* for 1982-83 (A. 107-11).

Thus the increase in the City's 1982-83 appropriation was far in excess of the $2.4 Million increase that the Board requested *for integration-related* expenses. It is clear that other items, such as replacement for ESAA funds, etc. *were* not part of the Board's application (A. 108 ¶"12"), and should not have been considered by either the District Court or the Court of Appeals (Appendix (i), p. 13a).

Conflict with the Eighth Circuit's Order in *Liddell vs. City of St. Louis.*

Certiorari should be granted because of an existing partial conflict between an order of the Eighth Circuit in *Liddell vs. City of St. Louis, et al.*, (9/13/83) and the Second Circuit's decision in the case at Bar, and a potential further conflict.

The Eighth Circuit's order in the *Liddell* case was on an application for a stay of District Court orders requiring the defendants to raise additional funds for the School Board by increased property taxes and sale of bonds. The Eighth Circuit order of September 13, 1982 denied in part, and granted in part, the application for a stay.

The Eighth Circuit cited "the timing of the applications" as a reason for not exercising its "discretion in favor of issuing a stay", and noted that "the school districts have already begun to implement the voluntary plan".

However, the Eighth Circuit *did* stay: "further" implementation of the plan after the "date of issuance of this (its) order;" "further consideration or action on any alternative measure to meet the capital needs of the City Board with respect to desegregation in the event the bond issue is not approved;" and, the issuance of "any order increasing the City Board's tax rate until further order of this (the) Court."

While the Eighth Circuit was motivated by the timing of the application to deny a complete stay; nevertheless it effectively stayed implementation of the District Court's order.

The Second Circuit denied our motion for a stay and affirmed the District Court's order, however, it expressed its concern with the District Court's process:

> "Should a dispute of this nature recur, we think it will normally be helpful if those who seek a court order for additional funding, and those who oppose such an order, supply the District Court with considerable detail reflecting the proposed expenditures in the absence of the additional funds claimed to be needed." (Appendix (i), pp. 12a-13a).

Presently there exists a partial conflict between the Eighth Circuit's order of September 13, 1982 in the *Liddell* case, and the Second Circuit's decision of July 17, 1983 in the case at bar.

The Eighth Circuit stated that it would hear the *Liddell* case "*en banc* on the merits in November" (Appendix (vi), p. 101a). Shortly thereafter, a decision can be expected which may be more sharply in conflict with the Second Circuit's decision in the instant case.

Counsel for the City of St. Louis has informed Petitioners herein that the City may file an *amicus curiae* brief on the present Petition for Certiorari, and that it will file a petition for writ of certiorari in the event of an unfavorable decision from the Eighth Circuit.

The District Court ordered an "interdistrict" remedy for an "intradistrict" violation.

The District Court's order directed Petitioners to appropriate additional tax revenues to the School Board to finance an extravagant, and unproven, "Voluntary" desegregation plan costing millions of dollars more than normally required.

The extra millions of dollars were to be used to "entice" or lure suburban non-district students into the City district, at the expense of the City's taxpayers and residents. This actually is a reverse twist of the normally prohibited "interdistrict remedy" for an "intradistrict" violation (*Swan vs. Charlotte-Mecklenburg Bd./Ed.*, 402 US 1, and *Milliken vs. Bradley*, 418 US 717).

The Buffalo City residents and taxpayers did not create the wrong. Further, Petitioner's predecessor as Mayor was exonerated of any fault. Rather, the responsibility was that of the Respondent School Board itself.

Now, to escape from the consequences of its wrong, the School Board is asking the City's residents and taxpayers to pay for an extravagant, and unproven, voluntary "interdistrict" remedy, which may, or may not, pan out.

Conclusion

For the foregoing reasons, Petitioners submit that the Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review, reverse and remand its decision affirming the District Court's order which directed the City Defendants to grant an additional appropriation of $7.4 Million to the Respondent School Board.

Respectfully submitted,

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APPENDIX (i)

Opinion of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983, and reported at 712 F.2d 809

George ARTHUR, *et al.*,
Plaintiffs-Appellees,

and

Community Advisory Board for Bilingual Education of Buffalo, *et al.*,
Plaintiffs-Intervenors-Appellees,

v.

Ewald P. NYQUIST, Individually and as Commissioner of Education of the State of New York, *et al.*,
Defendants,

James D. Griffin, Mayor of the City of Buffalo, *et al.*,
Defendants-Appellants.

No. 1037, Docket 82-7690.

United States Court of Appeals,
Second Circuit.

Argued April 6, 1983.
Decided July 22, 1983.

Appeal was taken from an order of the United States District Court for the Western District of New York, John T. Curtin, Chief Judge, 547 F.Supp. 468, directing mayor and common council to appropriate an additional

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7.4 million to enable board of education to comply with court-ordered public school desegregation plan. The Court of Appeals, Newman, Circuit Judge, held that: (1) district court was within its discretion in ordering the additional appropriation, notwithstanding that court did not require board to prepare line-by-line budget indicating precisely how it would spend amount originally appropriated, but (2) better practice is to order board to document how it would expect to spend level of funding it asserts is inadequate.

Affirmed.

J. Edmund De Castro, Jr., Buffalo, N.Y. (Jaeckle, Fleischmann & Mugel, Buffalo, N.Y., on the brief), for plaintiff-intervenor-appellee Community Advisory Bd. of Bilingual Educ. of Buffalo.

Bruce A. Goldstein, Gerald P. Seipp, and Serotte, Reich & Goldstein, Buffalo, N.Y., submitted a brief for plaintiff-intervenors handicapped children.

Frank G. Raichle, Buffalo, N.Y., (Arnold Weiss, Raichle, Banning, Weiss & Halpern, Buffalo, N.Y., on the brief), for defendants-appellants Mayor and Common Council of Buffalo.

Thomas I. Atkins, Gen. Counsel, N.A.A.C.P., Brooklyn, N.Y. (Jay, Klaif & Morrison, Buffalo, N.Y., on the brief), for plaintiffs-appellees.

Aubrey V. McCutcheon, Jr., Sp. Counsel to Corp. Counsel, Buffalo, N.Y. (James J. McLoughlin, Acting Corp. Counsel, William E. Carey, Asst. Corp. Counsel, Buffalo, N.Y., on the brief), for defendant-appellee Buffalo Bd. of Educ.

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Before KAUFMAN, TIMBERS and NEWMAN, Circuit Judges.

NEWMAN, Circuit Judge:

This appeal and a companion matter decided this day, No. 82-7802, concern the propriety of remedies ordered by the District Court for the Western District of New York (John T. Curtin, Chief Judge) as part of continuing efforts to eliminate the deliberate racial segregation previously found to have existed in the public school system of Buffalo, New York. In this appeal the Mayor and the Common Council of Buffalo (the "City defendants") appeal from Chief Judge Curtin's August 27, 1982, order requiring the City defendants to provide the Buffalo Board of Education $7,400,000 prior to June 30, 1983, in addition to the $150,629,822 appropriated by the City defendants to the Board for the 1982-83 school year. Though we believe a more detailed justification for the additional funds could usefully have been required by the District Court and should be required in the event that additional sums beyond appropriated funds are sought for subsequent school years, we affirm Chief Judge Curtin's order.

In 1976 the Buffalo public school system was found to have been deliberately segregated along racial lines, and liability for this unconstitutional conduct was imposed upon the then current members of the Board of Education and the Common Council, and the then incumbent mayor. *Arthur v. Nyquist*, 415 F.Supp. 904 (W.D.N.Y.1976), *aff'd in relevant part*, 573 F.2d 134 (2d Cir.), *cert. denied sub nom. Manch v. Arthur*, 439 U.S. 860, 99 S.Ct. 179, 58 L.Ed.2d 169 (1978). Implementation

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of a remedy has proceeded in stages as Chief Judge Curtin has wisely imposed upon the School Board the primary responsibility to fashion means of eliminating all vestiges of a segregated system of public education. In the 1976-77 school year, Phase I was implemented with the closing of ten schools and the opening of two magnet schools. Phase II, implemented at the start of the 1977-78 school year, called for the opening of eight more magnet schools. In June 1979 the District Court ordered complete desegregation of the entire school system and directed the Board to devise a system-wide remedy. The objective was minority enrollment in each school of not less than 30 percent and not more than 55 percent. The Board responded with Phase III in November 1979. The District Court's approval of that plan resulted in a remand by this Court for more detailed findings as to the adequacy of Phase III. *Arthur v. Nyquist*, 636 F.2d 905 (2d Cir. 1981). That remand led to the development by the Board of a plan that came to be known as Phase IIIx, which the District Court approved in May 1981. *Arthur v. Nyquist*, 514 F.Supp. 1133 (W.D.N.Y.1981), *aff'd mem.*, 661 F.2d 907 (2d Cir. 1981), *cert. denied sub nom. Griffin v. Arthur*, 454 U.S. 1085, 102 S.Ct. 643, 70 L.Ed.2d 621 (1981). The plan, which went into effect in September 1981, included a combination of magnet schools, early childhood centers, and special academies; pairing and clustering of schools; and a general upgrading of the school system to provide appropriate educational opportunities for disadvantaged minority students and to retain White students in the school system.

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The Buffalo school system has now completed the second year of the implementation of Phase IIIx. In view of Chief Judge Curtin the plan is achieving notable success in reaching the goal of a completely desegregated school system, and it is doing so with a minimum of mandatory pupil asignments or bussing. The Board chose to meet the targeted minority enrollment percentages by establishing innovative programs throughout the system and creating special schools so that a desegregated student population would be distributed throughout Buffalo's schools primarily as a result of the parents' preference for the schools and programs that the Board was providing. Though a plan of this sort has obvious advantages to a program that depends largely on extensive bussing, the implementation of such a plan requires considerable amounts of money.

The Board of Education is wholly dependent on the Mayor and the Common Council of Buffalo for its basic appropriation. It has no taxing authority of its own. The Board receives state and federal aid and is obliged to conform its programs to various requirements imposed by state and federal law. Like most communities where school authorities lack taxing power, Buffalo has experienced annual budget battles when the time has come for the Board to submit its budget requests to the Mayor and the Common Council. In the 1981-82 school year, the added burdens imposed on the Board by the requirements of Phase IIIx placed an extra strain on the budgeting process. That year the plaintiffs in the desegregation suit returned to court to seek additional

funding from the City defendants to enable the Board to implement the court-approved remedy. Fortunately, the parties resolved their differences, agreed to an additional appropriation of $2.1 million, and Chief Judge Curtin entered an order by consent for this additional sum. The current dispute has arisen because agreement could not be reached on the requisite funding for the 1982-83 school year.

For the current school year, the Board submitted to the City defendants its annual budget estimates calling for an appropriation of $162,362,979. Ultimately the City defendants appropriated $150,629,822, an increase of $7.9 million over the funds appropriated for the previous school year. Of sums appropriated for 1982-83 $149,129,822 was for the basic operations and maintenance budget, and $1,500,000 was for capital needs. The Board then determined that it could not implement Phase IIIx at the level of funding appropriated by the City defendants. Though it receded from its initial request of $162,362,979, of which $160,241,029 had been sought for operations and maintenance, it nevertheless sought to increase the operations and maintenance funds by $7.4 million over the appropriated amount. When compromise proved unattainable, the plaintiffs initiated the current round of litigation to require the City defendants to provide the Board with the additional $7.4 million.

The hearing on the plaintiffs' request for additional funding placed the District Court is an unenviable position. On the one hand Chief Judge Curtin recognized his obligation to determine the remedies necessary to

eliminate a constitutional violation. On the other hand, he also recognized the inadvisability of intruding excessively into the details of the administration of the Buffalo public school system. The result was a hearing marked both by presentation of considerable detail concerning school budgeting and by the District Court's reliance upon the good faith of the officials of the Board of Education charged with the responsibility for implementing the school desegregation plan. The Court heard and fully credited the assertions of Eugene T. Reville, the superintendent of Buffalo's public schools, and of Joseph T. Murray, the Associate Superintendent with the major responsibility for implementing the desegregation plan, that the school system could not comply with Phase IIIx without the additional $7.4 million. The principal evidence in support of this conclusion was Murray's presentation of a list of cuts the school system would be forced to make from its requested $162 million budget estimate if it were obliged to live with the $150.6 million appropriated by the City defendants. Included on this list were several items that Chief Judge Curtin found were of special significance to the success of the desegregation efforts, notably all of the teaching positions required to staff the kindergarten and pre-kindergarten programs. The District Court also received and credited testimony concerning the significance of cuts in federal funding and the imposition of new and costly obligations upon the Buffalo school system in order to comply with federal and state law concerning the education of handicapped children and with federal court decrees enforcing those statutory obligations. Ultimately Chief Judge Curtin explained in a

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comprehensive opinion his reasons for concluding that the City defendants should be ordered to appropriate an additional $7.4 million to the Board. *Arthur v. Nyquist*, 547 F.Supp. 468 (W.D.N.Y. 1982). From that ruling the City defendants appeal.[1]

An unusual aspect of the case in its appellate stage is the position expressed at oral argument by counsel for the plaintiffs. Thomas I. Atkins, Esq., who has represented the National Association for the Advancement of Colored People (NAACP) in more than thirty school desegregation cases, declined to defend the District Court's order, though he had signed plaintiffs' brief urging affirmance. In his view the District Court had failed to make sufficiently detailed findings to permit a determination as to whether or not the full amount of $7.4 million in additional funding was needed. Perhaps reflecting more the institutional position of the NAACP than the litigating position of the plaintiff students, Atkins decried the attempts of school boards throughout the country, operating under desegregation decrees, to secure additional funding ostensibly but, in his view, not realistically needed to carry out court-ordered remedies. In Atkins' view, school boards were pursuing their private agendas of unmet educational needs, while those advancing the cause of school desegregation were incurring the communities' wrath for the added financial burdens courts were imposing. The concern, doubtless advanced in complete good faith, is a serious one. We are no more disposed to dismiss it

[1] On May 27, 1983, we denied the appellants' motion for a stay of the obligation to pay the additional $7.4 million prior to June 30, 1983.

lightly than we are to permit its undeniable emotional force to sway our appraisal of what the District Court has ordered in the particular case before us. To that task we now turn.

The authority of the District Court to order the implementation of its remedial plan, including Phase IIIx, has already been adjudicated and is not in issue on this appeal. Nor is there any dispute that a district court may require the expenditure of funds to implement a desegregation remedy. *Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). Instead we face the narrower yet more elusive issue whether the Court properly determined the amount of additional money needed to implement the Court's remedy. That issue inevitably involves two related though conceptually distinct questions. The first is whether additional funds have been added only to the extent needed to remedy segregation or to the further and impermissible extent of accomplishing a general improvement in the quality of the local school system unrelated to remedying the effects of segregation. The second is whether the District Court's findings provide an adequate basis upon which an appellate court can determine that funds have been added only for a permissible remedial purpose.

This case presents those questions in a difficult context because of the broad scope of the District Court's remedy, which, in turn, reflects the School Board's commendable preference for relying primarily on voluntary pupil assignments rather than mandatory assignments with extensive bussing. Despite the obvious objections to it, bussing at least has the virtue of being a

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device that is easily tested to determine whether its scope exceeds the requirements of a desegregation remedy and, once its proper scope is ascertained, its incremental cost is subject to minimal dispute. A voluntary plan like Phase IIIx, however, which depends for its success on many factors including the drawing power of the magnet schools, the quality of remedial and compensatory education offered for the benefit of but not limited to minority students, and, to some extent, the attractiveness of the school system generally to majority students who might desert it, inevitably blurs the line between funds the School Board needs to comply with the Court's remedy and funds it would like to have to improve the discharge of its general educational responsibilities. In determining an appropriate level of funding for a desegregation remedy like the Buffalo plan, a court is entitled to require money for programs that materially aid the success of the overall desegregation effort. A program of that sort is not disqualified for needed funding simply because its inclusion improves the overall quality of the school system. At the same time a court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation. Striking the balance necessarily requires considerable deference by a district court to the good faith representations of the school authorities, *cf. Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 2461-62, 73 L.Ed.2d 28 (1982), and by a reviewing court to the knowledgeable assessment of a district judge intimately familiar with local conditions.

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Applying those considerations to this case, we conclude that the District Court's findings, assessed against the record as a whole, are marginally sufficient for us to conclude that the Court acted within its discretion in ordering an additional appropriation of $7.4 million. Chief Judge Curtin was entitled to credit the testimony of the responsible school officials concerning the cuts that would have to be made if the Board of Education were obliged to operate the school system at the level of funding proposed by the City defendants. Without doubt, loss of the positions and programs identified by Associate Superintendent Murray would have seriously impaired the implementation of Phase IIIx. Inevitably, in consideration of an overall school budget there is room for honest difference of opinion as to which items a board of education ought to cut in the event of a reduction in its budget request. The City defendants contend that the Board could have made cuts elsewhere and thereby lived within the City's original appropriation without sacrificing the items on Murray's list of proposed cuts. Our review of this contention would have been aided by a sharpening of the dispute in the District Court. It is not clear precisely what the City defendants believe a line-item budget for the School Board would have looked like if the Board had operated on the original appropriation without making the cuts identified by Murray.

In the District Court the City defendants contended that it was the responsibility of the Board to prepare a line-by-line budget indicating precisely how it would spend the amount originally appropriated by the City.

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Chief Judge Curtin declined to impose this requirement, fearing that it would accord the Mayor and the Common Council "greater control over the education system than is contemplated under the State law," which does not permit the City to "dictate to the Board" the manner of spending appropriated funds. 547 F.Supp. at 482. *See* N.Y. Education Law §2576 (McKinney 1981). We do not share the District Court's apprehension on this point. When the School Board seeks the aid of the District Court in ordering the appropriation of additional funds to comply with a court-ordered remedy, it will normally be helpful to see precisely how the Board would expect to spend the level of funding it asserts is inadequate. Such a presentation would reveal not only the items the Board expects to drop from its initial budget estimate, but also the items it expects to retain. No doubt such a presentation would afford the City officials an opportunity to level specific criticisms at various expenditures the Board proposes to make, but such criticisms are not the equivalent of a power to "dictate" the manner of spending. Instead, they simply afford the District Court, and a reviewing court, a focused opportunity to determine how much of the Board's additional request is justified. Whether or not the Board persuades the Court that all or a portion of the requested funds are needed, it is not bound to accede to the City's objections concerning specific expenditure items.

Should a dispute of this nature recur, we think it will normally be helpful if those who seek a court order for additional funding, and those who oppose such an order, supply the District Court with considerable detail

reflecting the proposed expenditures in the absence of the additional funds claimed to be needed. Faced with such presentations, the District Court may find it useful to enlist the aid of a neutral auditor, experienced in school budgeting, to assist in analysis of the figures presented.

The absence of such detail in this case, however, does not preclude us from upholding the District Court's order. Associate Superintendent Murray was very specific in detailing the cuts he believed would have to be made without the added funds. Undoubtedly some dollars could have been cut elsewhere in the school budget without impairing the desegregation remedy. But, by the same token, some of the dollars that the Board sought in its initial $162 million budget request and failed to receive, even with the added $7.4 million, undoubtedly would have been useful for the implementation of the plan. Absolute dollar precision cannot be expected in such matters. We cannot say that the District Court erred in accepting the Board's scaled-down estimate that $7.4 million additional funds were needed. Even with this addition, the Board's budget was approximately $5 million less than its $162 million request. Moreover, that budget request did not seek any additional funds to replace the reduction in federal funds. Chief Judge Curtin found that the Board's federal funding would decrease by more than $10 million. And at the same time that the Board was receiving less federal funds, it was obliged to expend additional money to comply with obligations for the education of handicapped and Spanish-speaking children. These developments

support the District Court's conclusion that the City's initial appropriation, though exceeding the 1981-82 appropriation by $7.7 million,[2] would not enable the Board satisfactorily to proceed with implementation of Phase IIIx.

Understandably the City defendants place special emphasis on an affidavit submitted by Murray in which he estimated that "direct expenditures in implementation of the desegregation program" would be $18,147,725 in 1982-83, an increase of $2,084,247 over the comparable figure for 1981-82. The City defendants contend that their $7.7 million increase for the Board in 1982-83 would more than cover this increase in "direct" desegregation costs. An exhibit to Murray's affidavit identifies the following as the components of the $18 million "direct" cost estimate: 145 elementary school teachers, 174 elementary school teacher aides, 58 high school teachers, equipment and supplies at the Early Childhood Centers and the special Academies, some plant expenses, and some bussing expenses. It is obvious from Chief Judge Curtin's opinion that he did not consider these items to be the only costs that the Board was incurring to comply with Phase IIIx. Though he recognized that he "could not intervene" if the only effect of budget cuts would be to impair the quality of public school education in Buffalo, 547 F.Supp. at 473, he recognized that it was vital to maintain and upgrade a variety of programs that

[2] This $7.7 million increase resulted entirely from an increase in state aid of $8.6 million, offset by other adjustments. The City's tax revenues devoted to the Board of Education under the City's proposed appropriation would actually have decreased by $.5 million.

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had been initiated to make the desegregation plan succeed. In addition to the magnet schools, he mentioned specifically the full-day kindergarten and pre-kindergarten classes. We agree with Chief Judge Curtin's implicit conclusion that the increase referred to in Murray's affidavit was only part of the increase needed to continue desegregation of the Buffalo school system.

In sum, we recognize, as did Chief Judge Curtin, that it is more costly to achieve desegregation through a plan that relies heavily on the voluntary preference of parents to send their children, White and Black, to high quality schools than simply to pay for the bussing of children to distant schools. The Buffalo Board of Education deserves commendation for the course it is pursuing, and the District Court has not erred in determining that in 1982-83 it needed an additional $7.4 million to continue its progress. We earnestly hope the parties will display the utmost good faith and cooperation to minimize, and preferably eliminate entirely, the need for District Court intervention in future funding disputes.

The judgment of the District Court is affirmed.

APPENDIX (ii)

Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered June 30, 1982 (unreported), granting a Hearing on request for additional funds

UNITED STATES DISTRICT COURT

Western District of New York

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civ-1972-325.

APPEARANCES:

JAY, KLAIF & MORRISON (DAVID G. JAY, ESQ., of Counsel), Buffalo, New York, for Plaintiffs.

JOSEPH P. McNAMARA, ESQ., Corporation Counsel of the City of Buffalo [AUBREY McCUTCHEON, ESQ., Special Counsel for the Buffalo Board of Education, and RAICHLE, BANNING, WEISS & HALPERN (FRANK G. RAICHLE, ESQ., and ARNOLD WEISS, ESQ.), Special Counsel for Mayor James D. Griffin and the Common Council of the City of Buffalo], Buffalo, New York, for Mayor James D. Griffin, Superintendent of Schools Eugene T. Reville, The Board of Education, and the Common Council of the City of Buffalo, Defendants.

APPENDIX (ii)—Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered June 30, 1982 (unreported), granting a Hearing on request for additional funds

JAECKLE, FLEISCHMANN & MUGEL (J. EDMUND deCASTRO, JR., ESQ., of Counsel), Buffalo, New York, for Plaintiff-Intervenor Puerto Rican Legal Defense and Education Fund.

SEROTTE, HARASYM & REICH (Bruce A. GOLDSTEIN, ESQ., of Counsel), Buffalo, New York, for Plaintiff-Intervenor John Bushey.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES (JOHN R. LoGALBO, ESQ., of Counsel), Buffalo, New York, for Intervenor Buffalo Council of Supervisors and Administrators.

At this time, the court must arbitrate a dispute between two codefendants which threatens the academic future of the children of this City and will affect every resident.

On May 27, 1982, the plaintiffs in this ten-year-old school desegregation action filed a motion requesting that the defendants show cause why the Common Council and the Mayor of the City of Buffalo [City defendants] should not be directed to allocate sufficient funds to their codefendant, the Buffalo Board of Education [Board] to enable the Board to provide adequate educational services and comply with the orders of this court.

The City has appropriated the sum of $150,629,822 for Board use during academic year 1982-83. Of this sum, approximately $10,505,000 was conditioned upon receipt

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by the City of increased State educational aid. The legislative appropriation for the additional aid was vetoed by the Governor of New York State. Unless the gubernatorial veto is overridden by the New York State legislature, the Board appropriation stands at $140,124,822.

This figure was reached after the procedures set forth in the Buffalo City Charter were followed. Pursuant to the Charter's budgetary process, the Mayor received budget estimates from municipal departments and from the Board pursuant to New York State Education Law §2576.

The Board submitted its 1982-83 operating and maintenance budget on February 1, 1982, requesting $162,362,979. It was reviewed by the Mayor and his staff, and a hearing was held by the Mayor in the Common Council chambers in City Hall on February 10, 1982. The hearing was open to the public and was attended by the top administrators of the Board.

After the hearing, the Mayor's staff again reviewed the request and recommended a budget of $150,000,000, which included the conditional sum of about $10,505,000 which the Board hopes to receive from the State. On May 21, after conducting further hearings, the Buffalo Common Council added $629,822, bringing the total to $150,629,822. The roughly $12,000,000 gap between this figure and the Board's request led to the instant motion.

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The case is an unusual one in that one of the defendants, the Board, is allied with the plaintiffs against its codefendant, the City. The positions of the two sides are diametrically opposed.

During the negotiations which took place during the last two weeks, the Board narrowed its request to $156,500,000. The Board claims it cannot function with less than this amount.

The City says that it cannot allocate any more funds. In an affidavit filed by the Mayor dated June 10, 1982, the City discusses its financial condition and the Mayor's proposals to revitalize the City. These are cited as the Mayor's reasons for refusing to increase the Board's appropriation.

The plaintiffs and intervenors state that they are unable, because of lack of resources and access to data, to explain specifically the need for extra funds. They seek a general order directing the City to allocate "sufficient funds." In addition, the plaintiffs refer to their pending motion of April 21, 1982. In that motion, plaintiffs seek further desegregation of the Buffalo Public School System. The plaintiffs urge the court to consider the possibility of the additional funds necessary for further desegregation in deciding the present motion.

These were the positions of the parties when the order to show cause was filed and, after several meetings with the court and several days of intense negotiations, they remain unchanged. After six days of discussion, the

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parties informed the court that they had reached an impasse. The court therefore has no choice but to order the parties to proceed to an evidentiary hearing.

At the outset, the court wishes to make clear that the purpose of the hearing is limited, as is the court's role in this matter. There is a distinction between the controversy between the Mayor and the Board and the issue before this court.

The Mayor and the Board disagree regarding the amount of funds necessary to provide an excellent education for the school children of the City. Their dispute pertains to school programs and day-to-day school operations. The issue before this court is more narrow. The court may be concerned only with the integration of the schools and only has the power to intervene in the controversy between the Board and the Mayor to the extent necessary to ensure compliance with the orders of this court and the orders of the United States Court of Appeals for the Second Circuit. A direction to the City to provide more funds can be made only if the Board and the plaintiffs are able to persuade the court that the failure to provide additional funds will interfere with these orders.

The court has stated time and time again that the primary responsibility for the schools is best left to the education experts of the Board and its staff. So, too, are funding disputes best settled among the parties within the arena of the budgetary process. The court cannot

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become involved in matters outside those which have direct impact upon the desegregation orders.

An example of the court's limited role is a controversy which arose in this case a few years ago. At that time, the Board was forced to cut back on various music and art programs, due to a lack of funds. The court was asked to issue an order directing the Board to reinstate these programs. Notwithstanding that the Board's action was a serious blow to a good educational system, the court refused to issue the order because the cuts in programs had equal impact upon majority and minority students.

With regard to the instant motion, the Board may be correct that it will be unable to provide adequate education to the students with the funds appropriated. But this is not a sufficient reason for court intervention. Instead, the burden shall be on the Board and the plaintiffs to show that the requested additional funds are "necessary to cure the effects of prior unconstitutional school desegregation." *Oliver v. Kalamazoo Board of Education*, 640 F.2d 782, 787 (6th Cir. 1980).

Although the court is powerless to act without such a showing, we are, of course, deeply interested in the quality of education of the City schools. As a constant observer of the Buffalo Public Schools, the court is aware that many improvements have been made in the School system, and many programs which have been instituted will result in additional improvements in the years ahead.

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Standardized test scores have improved over the years. There has been no massive flight of majority students from the City schools, no violence or disruptions of any kind. A recent newspaper report from the *Chicago Tribune* quoted James Barnes, the Director of the National Educational Strategic Center, which has monitored desegregation programs throughout the United States as saying: "Buffalo is a model .... It has got to be the best there is."

At a time when our community is suffering from a number of problems, the progress in improvement in our schools is something for all residents to be proud of. But, as in any organization, much remains to be done. The court cannot, of course, make a judgment at this time whether the Board will be entitled to an order directing additional funds after a hearing. But if the Board needs but does not receive additional funds to provide a proper education to the students in the Buffalo schools, the court is fearful that the substantial progress which has been made will be lost. This will certainly be detrimental to students for many years to come and will be a serious blow to the health and morale of our entire community.

Much is at stake in this controversy, and the court cannot overemphasize the desirability of a prompt and amicable settlement. For these reasons, the court urges the parties to continue to talk, to be flexible, and to be willing to think things out and compromise. In the meantime, the evidentiary hearings shall go forward as scheduled on July 1 and continue on July 2, 7, 8, and 9, if necessary.

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The court anticipates that the hearings shall be brief. In view of the numerous prior proceedings in this case, it will not be necessary for the parties to develop the factual background at length.

The newly retained attorneys for the Mayor have insisted that there be a line-by-line examination of the Board's request. Inquiry has been made, for example, about cost of fuel, supplies, and various educational programs. Given the opportunity which the Mayor and his staff had throughout the budgetary process during the year to receive this information, we shall not spend an inordinate amount of time repeating the process. Instead, the questioning of the witnesses shall be concise and directed to the issue at bar. Because of the number of cases awaiting trial on the court's calendar, it may be necessary to set strict time limits for both direct and cross-examination.

It appears to the court that it would benefit all concerned to have all of the pending issues involved in a single proceeding. Plaintiffs' position is that there are a number of schools remaining outside the court's guidelines which should be desegregated this fall. We shall explore the plaintiffs' motion for further desegregation and the Board's opposing arguments during the evidentiary hearing. After the hearing, we hope to be in a position to issue a final order, ending the court's role in *Arthur v. Nyquist*.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 30, 1982

APPENDIX (ii)

Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered August 27, 1982, and reported at 547 F. Supp. 468

George ARTHUR, *et al.*,

Plaintiffs,

v.

Ewald P. NYQUIST, *et al.*,

Defendants.

No. Civ-1972-325C.

United States District Court,
W. D. New York.

Aug. 27, 1982.

Jay, Klaif & Morrison, Buffalo, N.Y., (David G. Jay, Buffalo, N.Y., of counsel), for plaintiffs.

Aubrey McCutcheon, Sp. Counsel for the Buffalo Bd. of Educ., Buffalo, N.Y., and William E. Carey, Asst. Corp. Counsel, Buffalo, N.Y., for defendants Superintendent of Schools Eugene T. Reville and The Bd. of Educ.

Raichle, Banning, Weiss & Halpern, Buffalo, N.Y. (Frank G. Raichle, and Arnold Weiss, Buffalo, N.Y., of counsel), for defendants Mayor James D. Griffin and the Common Council of the City of Buffalo.

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Jaeckle, Fleischmann & Mugel, Buffalo, N.Y. (J. Edmund deCastro, Jr., Buffalo, N.Y., of counsel), for plaintiff-intervenor Community Advisory Bd. for Bilingual Educ. of Buffalo.

Serotte, Harasym & Reich, Buffalo, N.Y. (Bruce A. Goldstein, Buffalo, N.Y., of counsel), for plaintiff-intervenor John Bushey.

Bruce Fenwick, Buffalo, N.Y., for intervenor Buffalo Teachers Federation.

Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y. (John R. Logalbo, Buffalo, N.Y., of counsel), for intervenor Buffalo Council of Sup'rs and Administrators.

CURTIN, Chief Judge.

In what threatens to become an annual ritual, the Buffalo Board of Education [the Board] is forced to ask this court to order its codefendants, the Mayor and the Common Council of the City of Buffalo [City defendants], to provide additional funds to the Board for implementation of this court's school desegregation orders.

For the 1982-83 school year, the Board requested a budget of $162,302,979. Pursuant to the budgetary process of the City charter and section 2576 of the New York State Education Law, the Mayor received this request from the Board. The Mayor and his staff reviewed the budget, held a public hearing, and recommended that the estimate be reduced to

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$150,000,000. After conducting additional public hearings, the Common Council added $629,822, bringing the total to $150,629,822. This is the sum currently appropriated for Board use. Approximately $149,100,000 is to be used for Board operations and maintenance, and the remainder for capital expenditures.

Under the law, the Board is financially dependent upon the City for funds. The Board has since indicated that it could operate on a minimum budget of $156,500,000. The Board cannot, however, make up the difference between the amount it needs and the amount allocated in the budget but must look to the City for adequate funding.

Because of the large gap in funds, plaintiffs filed a motion requesting that the court order the City to provide additional funds. Last year, the same dispute arose regarding funds. On July 30, 1981, the Board filed a similar petition asking for more money. Last year's dispute was settled amicably. After several meetings and much discussion, the court was able to enter an order upon consent of the parties directing the City to provide an additional $3,100,000 to the Board.

This year, there was no such agreement. The Board joined in the plaintiffs' motion, and at the court's direction, the parties conducted settlement negotiations for six days. These negotiations were ultimately unsuccessful, and the court was forced to order an evidentiary hearing. The hearing commenced on July 2, 1982, and continued for six days. Upon review of the transcript and exhibits and the post-hearing briefs, the court is ready to issue a decision.

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In approaching the current controversy, some of the history of this ten-year-old school desegregation case should be kept in mind and bears repeating.

In April of 1976, the Buffalo Board of Education was found to have engaged in deliberate and unconstitutional segregation of the Buffalo Public School System [BPSS]. *See Arthur v. Nyquist*, 415 F.Supp. 904 (W.D.N.Y.1976), *aff'd in part, rev'd in part, remanded in part*, 573 F.2d 134 (2d Cir. 1978). After this finding of liability, the court and the parties immediately set out to devise a fair and effective program to remedy the effects of the prior unconstitutional segregation. As early as May, 1976, the court held hearings to help formulate a remedial plan. Further hearings were held throughout the spring and summer of 1976. From that time on, the court has had numerous hearings and dozens upon dozens of meetings with the parties to hammer out the details, to further refine, and to set in motion an adequate plan for desegregation.[1]

After the liability finding, the court ordered the Board to submit an initial plan for desegregation, and the Board responded by coming forward with Phase I. This plan closed ten schools in an effort to save money and to integrate previously all-majority schools. In addition, Phase I opened two Magnet Schools, the Waterfront School and City Honors.

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[1] Indeed, throughout the remedy phase of the lawsuit, it has not been uncommon for the court to meet at least weekly with the parties and, at times, more often.

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In September of 1977, Phase II was implemented. Phase II included eight Magnet Schools. Phase II was designed to insure that each school had at least 20 percent minority students in attendance.

In June of 1979, the court ordered that complete desegregation take place. The court ordered the Board to design a systemwide remedy and held that a school would not be considered as desegregated and acceptable to the court unless there was over 30 percent and under 55 percent minority population.

In November of 1979, the Board of Education submitted a proposed Phase III plan. After the decision of the United States Court of Appeals for the Second Circuit was issued in January of 1981, *see* 636 F.2d 905 (1981), the court ordered the Board to comply with the directives of the Second Circuit and establish a plan that could be put into effect on an expedited basis. Phase III thus became known as Phase IIIx, and its provisions were put into effect a year earlier than originally scheduled. This court approved the implementation of Phase IIIx on May 14, 1981. 520 F.Supp. 961 (W.D.N.Y.1981), and the plan went into effect in September, 1981.

The results of these efforts is the highly successful Buffalo model of school desegregation. Under the direct administration of Buffalo Board of Education Associate Superintendent Joseph T. Murray and the supervision of the Superintendent of the BPSS, Eugene T. Reville, the system has implemented several innovative programs.

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These programs include the Magnet Schools, the Early Childhood Centers, and the Academies.[2] In addition, the BPSS has utilized innovative concepts, such as "clustering of schools," and "feeder patterns," so that children attending any one of a number of certain schools in the lower grades will be sent to a specific high school, thus insuring that at both levels the grades will be integrated. Through implementation of these programs, the BPSS has achieved a significant success, and the programs themselves have been applauded by educators throughout the country.

---

[2] There are a number of examples of successfully integrated Magnet Schools flourishing in the Buffalo Public School System. In many instances, when some of these schools were first proposed, some critics predicted that the schools would fail to forward the progress of integration. Most have been successful from an integrational and an educational point of view. Some examples follow:

Buffalo Traditional School, Grades 5-12, with about 900 students, has 54.6 percent minority students. A very structured environment exists in this school. Formed after the court's order of May 4, 1977.

In contrast is the *Waterfront School*, with an "open concept" plan. This school has grades pre-Kindergarten through 8, with an enrollment of 885 students and 51.3 percent minority. It was formed by the court's order of July 9, 1976.

Campus West School is operated in cooperation with the College Learning Laboratory of the State University College at Buffalo and has an enrollment of 428 students, 47.7 percent minority.

Build Academy at one time was an almost all-minority school. With strong parental involvement, it now has an enrollment of 905 students, with a 52 percent minority representation.

There are many other examples of innovative Magnet Schools, including the Montessori School, the Buffalo Academy for Visual and Performing Arts, and the Buffalo Alternative School.

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A key to the success of the plan is the fact that for the most part, the integration of the schools has been achieved by voluntary means. Through the use of innovative educational techniques, the need for fixed assignments and mandatory busing of students have been kept to a minimum. There has been no disruption of the schools, no violence, and no massive "white flight" of majority students from the City.[3] Instead, the City schools have improved through the use of these programs, and the proportion of majority to minority students has remained steady, even as the population of the City has decreased.

[3] The following chart demonstrates that, while there has been a decline in the enrollment of the BPSS since 1976, the BPSS has lost proportionately fewer students than have the Buffalo Diocesan schools. This indicates that the decline is due to factors other than the integration orders.

Exhibit 794 at 5.

(Footnote continued on following page)

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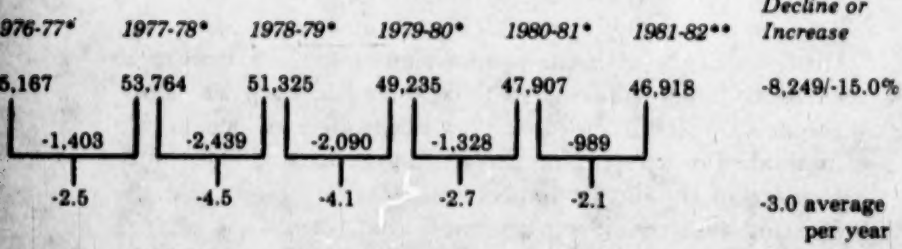
(Footnote continued from preceding page)

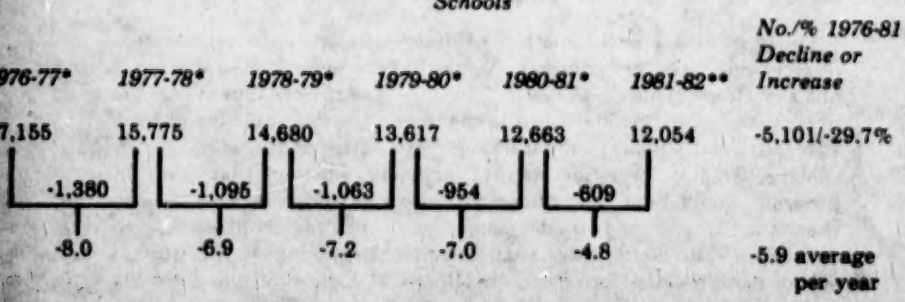
AN ENROLLMENT COMPARISON OF THE BUFFALO PUBLIC AND THE DIOCESAN SCHOOLS
1976-1981

Buffalo Public Schools



* Ref. used BEDS
** September 29, 1981 Ethnic Census Report

Buffalo Diocese Schools



* Directory of Schools published by the Diocese of Buffalo Department of Education 1976-1981 editions.
** Document received on November 23, 1981 with current enrollment figures.

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It cannot be denied that from an educational point of view, the programs such as the Early Childhood Centers and the Magnet Schools have been successful. They have been developed with a background of solid integration effort and, most importantly, their use has been sanctioned by this court and the United States Court of Appeals for the Second Circuit.

In reviewing the Board's request for additional funds, then, we begin with the proposition that the BPSS as it currently exists, having evolved over the six years since the court's liability decision, is the preferred, acceptable method of desegregating the Buffalo schools. It is simply too late in the day to expect the Board to dismantle the existing system and set up a new structure.[4]

Through the court's extensive involvement in the case, we have become intimately familiar with the various programs and the system as a whole and are acutely aware of how their quality and reputation affect the

[4] It may be that another method of desegregation—such as a system of city-wide fixed assignments—would have proven less expensive if initially implemented in 1976. In my judgment, however, the imposition of city-wide fixed assignments would not have been successful in 1976 and is not a feasible alternative at this time.

Moreover, we have no way of knowing whether that kind of program would have been more cost-effective. There is no question that the Board has made some very successful attempts to economize. The court notes that since the beginning of the Buffalo school desegregation program, the Board of Education has closed a total of 22 schools in an attempt to save money. This was done in recognition of a generally declining population in the area and a corresponding decline in school population.

success of Buffalo's integration efforts.[5] As this court has repeatedly stated, we have no interest in usurping the functions of the Board and could not, under any circumstances, run the BPSS. That job is left to the expertise of the Board and its staff, particularly Mr.

[5] That the quality of education to be received within the Buffalo Public Schools is directly related to the success of any school desegregation order is not disputed by the City defendants. One of the witnesses who testified for the Mayor and the Common Council was the Mayor's Commissioner of Administration and Finance, Mr. Richard Planavsky. Before he was appointed to his current position, Mr. Planavsky was employed as an eighth grade algebra teacher in the BPSS. The following exchange took place during cross-examination of Mr. Planavsky between the attorneys for the Board of Education and the Mayor's Commissioner of Administration and Finance:

> Q What did you personally do in your involvement to implement the desegregation program of this Court?
>
> A I did a real good job of teaching my students.
>
> Q Well, explain what you mean by that. That is a conclusion, your conclusion?
>
> A Well, I thought I had a very good rate, as far as my students were concerned, of passing mathematic courses. I thought that I even taught extra algebra courses, my students were able to get credit for 9th grade algebra while they were 8th graders. I think these are all things that are furthering the program.
>
> Q You think those kinds of things further the implementation of this Court's desegregation order?
>
> A Yes, I do.
>
> Q Why do you think that?
>
> A Because I think that it helps to make it a successful experience for the children in an integrated classroom if there is a high success rate, if they are getting along with one another and so on.

Tr., Vol. 2 at 71-72.

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Reville and Mr. Murray. Nevertheless, to the extent the programs affect the desegregation efforts, they are the court's concern.

The court has made clear, too, that it is reluctant to interfere in this funding dispute. As stated in the order of June 30, 1982, before this court can order the Mayor and the Common Council to provide additional funds to the Board of Education, the Board has the burden of showing that these funds are necessary to insure compliance with our orders and with the orders of the United States Court of Appeals for the Second Circuit. With this in mind, we turn to the question of whether the Board has satisfied this burden.

The Board's primary witness during the hearing was Mr. Joseph T. Murray, the Associate Superintendent for Instructional Services. Mr. Murray has been a witness in this case on many occasions. In addition, he is a constant participant at the meetings which take place among the parties and the court. Throughout the remedy phase, the court has found him to be a thoroughly credible witness. He is, undoubtedly, the most knowledgeable person regarding the desegregation program and its needs. At the time the Phase I Plan was proposed by the Board, there were many predictions that the reliance upon voluntary programs could not work. Mr. Murray was confident that the plan would succeed, and throughout the years, his guidance and insight have proven reliable and invaluable.

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Mr. Murray testified that the Board would not be able to adequately desegregate the schools with an operations appropriation of $149,000,000. In an affidavit submitted to the court on June 1, 1982, he attached a list of projected budget cuts which would have to be made from the instructional division unless the budget appropriation was increased. *See* Affidavit in Support of May 27, 1982, Order to Show Cause, Exhibit E. This document shows that a number of the items which would have to be eliminated from the BPSS would indeed have a drastic, negative impact upon the school desegregation order.

The projected cuts include such functions as two elementary school principals, three secondary principals, central office administrators for handicapped education, helping teachers, reading and math specialists, music, art, physical education teachers, librarians, guidance counselors, 52 elementary teachers, and 37 secondary teachers. In addition, Mr. Murray stated that the BPSS would be forced to eliminate 53 pre-Kindergarten teachers and 70 Kindergarten teachers, thus effectively ending the successful Kindergarten and pre-Kindergarten programs.

In any school system, budgetary cuts of this nature would have a serious impact upon the quality of the school system. If these cuts were to go through as anticipated, there is little doubt that they would have a deleterious effect upon the quality of education offered to the school children of the City of Buffalo. This is especially unfortunate in light of the recent progress

made in the quality of education and in the fact that the reading scores and general performance scores of the school children have been steadily improving over the past few years. If this were the only impact, the court could not intervene in this controversy. The Board has demonstrated, however, that these cuts would have a serious negative impact upon the desegregation orders of this court.

In the opinion of Mr. Reville, Mr. Murray, and the other educational experts of the Board and its staff, the highly successful Kindergarten and pre-Kindergarten programs are a crucial part of the desegregation effort. The City has suggested that the Board "could go a long way towards living within its appropriation by eliminating pre-Kindergarten and all-day Kindergarten." *See* Brief of the Mayor and the Common Council at 18. The Mayor points out that these programs are not mandated by the Commissioner of Education and that Buffalo has a disproportionately high ratio of students attending these programs, far more than in comparable cities such as Syracuse, Rochester, New York City, or Yonkers. This suggestion of the City completely misses the mark. None of the other cities has the same need to offer full-day Kindergarten or pre-Kindergarten classes in order to attract majority students to implement a school desegregation program. The City has seized upon a list of items supplied to Mr. Richard Planavsky, the Mayor's Commissioner of Administration and Finance, by Mr. Murray, setting out those items which are and are not mandated by the Commissioner of Education (see

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Exhibit attached to supplemental affidavit of Richard Planavsky) and has apparently taken the view that anything not mandated by the Commissioner of Education may be eliminated in order to save money. This, however, is not an accurate or realistic view of the situation. While the Commissioner of Education is by statute the authority dictating the minimum requirements for the education system, there are many other obligations which bind the Board and hinder its ability to freely control its expenditures. The Board is obligated to comply with the orders of this court and with various state and federal statutes and regulations, including those recently enacted regarding handicapped children.

Under federal and state law, handicapped students must be afforded the maximum opportunity for integration with non-handicapped students. *See* 20 U.S.C. §1412(5)(B); Rehabilitation Act of 1973 §504, 29 U.S.C. §794; 20 U.S.C. §1401(18); 34 CFR §300.550, §300.4, §104.33. In educational jargon, the placing of handicapped students with non-handicapped students at every possible opportunity is called "mainstreaming" of the handicapped youngsters. Under the law, the school district has the responsibility to provide an appropriate education designed to meet the individual needs of each child. This law is applicable to the school district without regard to the finances available to the Board.

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In addition to the federal and state laws and regulations, the Board is also bound by this court's orders in two pending cases, *Andres v. Reville*, Civ. 80-482, and *Bushey v. City of Buffalo Board of Education*, Civ. 81-254.

A consent order was issued in the case of *Andres v. Reville* in May of 1982. During the hearing, both Mr. Murray and Mr. Reville testified that the reduction in the teaching staff which will be required unless additional funds are forthcoming, would be a violation of the consent decree in the *Andres* case and would also place the school in jeopardy of violating the federal and state law.

For example, the records show that in the case of children who are severely physically handicapped, it may be necessary to have as few as six children in a classroom, which requires the Board to hire additional staff because these children cannot care for themselves and need both the assistance of the teacher and an aide if they are to receive an adequate education. *See* Tr., Vol. 6 at 144. Moreover, the consent order in the *Andres* case requires that an

> adequate number of supervisory personnel shall be assigned to the TMR program. Further, a sufficient number of aides and professional staff shall be utilized to accomplish the matters and principles set forth in this agreement. Adequate and appropriate in-service training shall be established and provided to said aides and professional staff.

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See Civ. 80-482, Order of May 27, 1982.[4]

[4] *Andres v. Reville*, Civ. 80-482, involves trainable mentally retarded [TMR] school children. The Students involved in *Bushey v. Board of Education* are all handicapped school children plus all those suspected of possessing a physical, emotional, or mental handicap.

What constitutes a sufficient number of aides and teachers has been defined more specifically in the agreement stipulated to by the parties also on May 27, 1982, which has been filed with the court and made a part of the *Andres* case. Paragraph 11 of the agreement provides that:

> As a result of the increase in individualized objectives and community-based training, and based upon the present enrollment the staffing in the TMR program shall be at the following levels:
>
> (a) At School 45—5 teachers and 2 aides
> (b) At Buffalo Traditional—5 teachers and 3 aides
> (c) At McKinley—4 teachers and 2 aides
> (d) At OTC—staffing shall remain the same

These figures are deceptively small. This order relates only to the trainable mentally retarded children and does not at all cover the much larger class of learning disabled, physically, and emotionally handicapped children. The record shows that at this time, it is impossible to ascertain exactly how many of those children there are in the BPSS. And, indeed, one of the objectives of the *Bushey* case is to establish a program within the school system which would identify, test, and categorize those children needing special education.

Other aspects of the regulations regarding handicapped needs require that the Board provide various special classroom setting called "resource rooms" in order to mainstream children with learning disabilities. A child afflicted with a learning disability can spend the majority of his or her day in a classroom with non-handicapped children and can have access to the resource room or to a special self-contained classroom for those subjects in which he or she needs special tutelage, or for those periods of the day when he or she needs special attention. The child's regular classroom teacher must be involved in planning the curriculum for the handicapped child. This, of necessity, creates a larger burden for the classroom teacher, particularly since the average student-teacher ratio is above the norm within the BPSS. Because of the additional demands of the teacher's time, it is understandable that the Board would request the additional teachers and the additional aides, in particular, to effectuate these rules and regulations. *See* Tr., Vol. 6 at 140-46.

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There is no question that compliance with these laws will cost the Board a great deal of money. And, indeed, many of the increases in the school budget were for implementation of these regulations, orders, and laws regarding handicapped children.

Another "non-mandated" commitment of the Board is the requirement that non-English speaking children or children who have limited English proficiency receive an adequate education. There are a significant number of children in the City who do not speak English at all, or who do not speak it sufficiently well to attend classes given in English. Therefore, the Board must provide classes where instruction is given in a variety of languages.

In particular, there is a large number of Spanish-speaking children in the City. The Hispanic intervenors entered the case in 1977 and have endeavored to protect the interests of these children. The City is on record as being opposed to the creation of two new positions within the system which the Board claims are necessary to enable the Board to comply with the court's orders regarding Hispanic school children. One would be stationed at Grover Cleveland High School and the other at the Herman Badillo Community School. Both of these schools have a disproportionately large number of children who lack significant English skills. Therefore, it is essential that the Board provide bilingual personnel so that the school officials and teachers will be able to communicate with the school children and their parents.

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In addition, as the Hispanic intervenor has pointed out, the Board is committed to the expenditure of certain funds through operation of the federal grant system. That is, in requesting and receiving federal funds over the past few years, particularly with regard to certain bilingual programs and programs for the Native American students, the Board committed itself to supply certain services to the students who would take advantage of these classes. In making the application for federal funds, the Board was required to make assurances that the programs would continue to be provided regardless of whether the organization making the application continued to receive federal funds. Therefore, although certain federal funds have been lost, the Board is nevertheless obligated to provide these services to the school children. *See* Tr., Vol. 1 at 70-71, Vol. 5 at 124-26. This, then constitutes an additional drain upon the Board's financial resources, and one which must continue to be met by the Board out of its operating funds, even if the federal funds are not forthcoming.

Yet another obligation is imposed on the Board by operation of the collective bargaining agreements which are in effect between the Board and many of its employees. Much has been made of the fact that teachers and administrators are to receive a six to seven percent increase in pay for the next school year.

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The court notes initially that the salary increases for the year commencing July 1, 1982, consist of six percent across-the-board increase. In addition, for teachers with a high level of experience, above the fourteenth step, there is an additional one percent increase. This wage increase, and the previous increase for the year July 1, 1981—June 30, 1982, were negotiated and agreed upon as part of the usual collective bargaining process. The terms of the agreement, which were negotiated in 1981 to cover the two years, are public knowledge and were known to the Mayor and the Common Council.

As the record demonstrates, the negotiated increases are not overly generous, and they are comparable to the wage increases received by City employees. Indeed, despite the Mayor's contentions to the contrary, the record shows that disregarding automatic increments for increased qualifications or step increases, the yearly percentage raises for the Buffalo teachers have been smaller than those allocated to City white collar workers and police officers and firefighters over the past two years.[7] One of the main reasons for the increased costs for which the Board is seeking additional funds is the Board's proposed hiring of 125 new teachers and 46 additional teacher aides. As noted above, however, many

[7] This subject was covered at length during the hearing. While there was some initial confusion regarding the precise figures, they were made clear by exhibits submitted by the Board. *See* Tr., Vol. 2 at 161-67; Vol. 3 at 72-75; Exhibits 774, 775, 776.

of these new positions are necessary to implement the regulations regarding handicapped children.[8]

Further, just as some positions are necessary to enable the court to comply with the court's orders in the *Bushey* case and with federal and state laws, so too are other positions, such as bus aides, obviously necessary to implement the desegregation order.

The City's position is, basically, that these positions are not mandated by the Commissioner of Education of the State of New York; therefore, they are not necessary. However, as we have stated, the desegregation system has worked because of the voluntary aspects of the system. Parents volunteer to have their children sent to certain schools, in part because of the high quality of education the children will receive and also because they are assured the children will be well cared for. Some of the children who board buses for the Early Childhood Centers or for the Montessori schools are quite young.

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[8] During the hearing, Mr. Murray testified that, of the 46 additional aides, the Board already is paying for 23 aides from other sources which are no longer available. Mr. Murray stated that the aides are used to provide services to handicapped youngsters. The 23 aides who are currently employed are used in the Academies and in the Early Childhood Centers in particular, to assist the teachers and to help give the individualized attention necessary to the handicapped child. He testified that the additional aides will be used to provide equity in the Academies and the Early Childhood Centers so that the handicapped children will have the same programs and will be able to take advantage of currently existing programs in the same manner as non-handicapped children. *See* Tr., Vol. 1 at 60-61.

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Clearly, these children are incapable of watching for their stops, of knowing when and where to leave the bus. An aide is required to insure that the child gets off at the right bus stop and also to insure that someone is there to receive the child. Without the assurance that there will be someone to care for the child, the Board fears, and with some justification, that the parents will be reluctant to let their children board the buses.

Moreover, the need for increased funds to hire more teacher aides and bus aides is evident, because although a smaller student population is projected for the coming school year, more children will be transported than last year.

With regard to the number of teachers employed by the Board, it is evident that here, too, a decrease in the number of teachers—both classroom teachers and teachers in special classes—is relevant to the success of the desegregation program.[9]

[9] There has been some discussion regarding the number of teachers in the BPSS and the teacher-pupil ratio in the System compared to other school districts. During the hearing, the attorneys for the Mayor produced a copy of a newspaper article which had been printed in a local newspaper. This newspaper article presented statistics comparing the pupil-professional ratio and the pupil-teacher ratio of Buffalo and numerous other counties and cities. The statistics showed that the BPSS has more professionals per pupil than is average among county school districts and among districts within the State. The same is true with regard to the pupil-teacher ratio. The conclusion which the City drew from these figures was that the class size in Buffalo was smaller than average throughout the County and

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Once again, we must emphasize that because of past orders of the court and the history of the litigation, the City as well as the Board have committed themselves to a continuation of the integration program started with

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throughout the State. From this, the City defendants concluded that significant savings could be achieved by increasing the small class size.

Mr. Reville disagreed with both of these conclusions. The Superintendent explained the figures in the newspaper article during the hearing and also explained that the pupil-teacher and pupil-professional ratio did not mean that Buffalo's class size was smaller on the average than other districts. On the contrary, Mr. Reville testified that Buffalo's classroom size was in fact the largest in this area.

Mr. Reville explained, first, that the figures cited in the article were based upon a budget which included some $20,000,000 to $25,000,000 of federal funds which would be seriously reduced. The fact that the federal funds will be lost, Mr. Reville stated, will increase the staff ratio most likely to a degree higher than that of the other schools stated in the article. In any event, the classroom size is currently higher than the suburban schools, and the highest in the County. The master contract entered into between the Board and the Buffalo Teachers Federation states that the classroom size shall not exceed 33 students. Tr., Vol. 5 at 175, and the record shows that the average size for a class of elementary school children was 28 students during school year 1981-82 (*see* Attachment C to Mr. Murray's Affidavit of June 3).

It is apparent from the record that the City defendants have simply misconstrued the figures in equating pupil-teacher ratio with class size. Mr. Reville and Mr. Murray have explained adequately that the pupil-teacher ratio is not any kind of representation of class size, because it reflects as well special reading teachers, special math teachers, handicapped teachers, and those teachers which are provided for by the federal funds, such as teachers employed by the Performing Arts Academy to teach drama and music, etc. The same is true for the professional-pupil ratio.

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Phase I and continuing through Phase IIIx and the concept of Magnet Schools and Early Childhood Centers.

Small classroom sizes or the assistance which an aide can give to a teacher within a classroom is, in the opinion of the educational experts of the Board, an integral part of these programs. In response to the question whether the Board could continue to successfully operate its program next year without additional staff, Mr. Murray's answer was unequivocal. He said, "We cannot." Tr., Vol. 1 at 64.

Another very serious problem facing the Board this year is the dramatic decrease in the amount of federal aid the BPSS has been receiving. Mr. Reville testified that the BPSS receives more federal aid than any other school district of comparable size in the country and that many of these funds are used for desegregation. Tr., Vol. 5 at 167. The record shows that for school year 1982-83, these funds have been slashed severely.

With the passage of the Education Consolidation and Improvement Act of 1981, as part of Title V of the Omnibus Budget Reconciliation Act of 1981, Pub.L. 97-35, Congress consolidated a number of programs, including the Emergency School Aid Act, 20 U.S.C. §§3191-3207, under which the Board received a large amount of desegregation funds, into block grants to be distributed to the states.

The Board has lost a substantial amount of funds, over $10,000,000, because of changes in the law. The issue

was discussed during the hearing. Mr. Murray and Mr. Reville testified that despite the devastating effect of these cuts, the Board did not ask the City to replace the lost funds. The Board's bottom line figure of $156,500,000 reflects significantly smaller amount of actual funds available for desegregation over what the Board received last year.[10] Tr., Vol. 1 at 23-25; Vol. 5 at 14-20.

While the Board did not and does not now ask the City to replace these desegregation funds, the cutbacks are relevant to the issue of the Board's need for more funds. The anticipated losses were made known to the Mayor and Common Council during the budgetary process, and the City defendants were kept informed. It is evident from the record that the Board will need far more funds to operate the schools and carry on the court's desegregation order than it had available last year. Upon review of the entire record, the court accepts the expert opinion of the Board staff that $149,100,000 will not be sufficient to enable the Board to desegregate the schools. The court finds that the Board has carried its burden of demonstrating that additional funds are required and that they are "necessary to cure the effects of prior unconstitutional school segregation." *Oliver v. Kalamazoo Board of Education*, 640 F.2d 782, 787 (6th Cir. 1980). The court shall therefore order the City to

[10] Mr. Murray and Mr. Reville stated that if the Board included the amount of lost federal funds, its budget request would be in excess of $169 million for operations and maintenance funds. Tr., Vol 1 at 26; Vol. 5 at 153-54.

make available an additional $7,400,000 to the Board on or before June 3, 1983, so that the Board shall have sufficient funds at its disposal to implement the orders of this court.

The Mayor characterizes the Board's request for the funds as an application for a mandatory injunction, in which remedies are issued under compelling circumstances, citing *Citizens Concerned, etc. v. City and County of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980); *Holy Spirit Ass'n v. Town of New Castle*, 480 F.Supp. 1212 (S.D.N.Y. 1979). The court has considered these cases and finds that they are inapplicable to the instant case for many reasons. The fundamental and crucial point which the Mayor overlooks is that he and the Common Council have been defendants in this school case since its inception and have had a continuing duty to stay informed about the needs of the school district and act in partnership with the Board in making available sufficient funding. Also, as the court has already explained, the Mayor and the Common Council have the obligation under New York law to fund the schools.

In each of my prior orders, it was made clear that the burden to desegregate the school falls not only upon the Board of Education but also upon the Mayor and the Common Council. That the Board has been in the vanguard of the attempts to formulate an effective remedy is, as a practical matter, a necessary

development. Nevertheless, we must keep in mind that the City and the Mayor, too, were defendants in the original lawsuit.[11]

As a defendant, it is the duty of the Mayor and the Common Council, as well as the Board, to insure that the schools are effectively and completely desegregated. As the chief executive officer of the City and as chief fiscal officer, the Mayor has the affirmative obligation of assuring that there are adequate funds available to guarantee that this is possible. It was the Mayor's duty to keep informed of the court's orders which directed the Board to implement various integration programs and to assess the impact these orders would have upon City

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[11] The Mayor's predecessor in office, the late Frank A. Sedita, was found to have been not guilty of racial discrimination in the original liability decisions. There is no question, however, that Mr. Sedita's successors remained in the lawsuit in their official capacities. Indeed, this very issue arose last year, after the court issued an order in May of 1981 directing the Board to implement Phase IIIx.

In June of 1981, the Mayor sought clarification as to his status in the lawsuits so that he could appeal the court's decision regarding Phase IIIx. At that time, the court stated:

> The court finds that the Mayor is a party to this lawsuit. Under Rule 19 of the Federal Rules of Civil Procedure, a person shall be joined as a party in an action if in his absence complete relief cannot be granted. Since it has been necessary to order the defendants to implement a desegregation plan, it is clear that the Mayor, as a key fiscal officer of the City, is an essential party.

See Order of June 8, 1981, at 1-2. The Mayor's status as a defendant was recognized by the United States Court of Appeals for the Second Circuit when it heard oral argument on his appeal and subsequently rejected it.

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finances. The Mayor's task as codefendant in the lawsuit was to familiarize himself with the needs of the Board, *vis-a-vis*, the desegregation program. He should have affirmatively inquired as to what was necessary, what the program entailed, what were the Board's needs with regard to those programs mandated by other court orders and by the state and federal regulations. The focus of his inquiry should have been: how much money is necessary to enable the Board to carry out the mandates of this court and its other commitments? It is clear from the testimony that the Mayor failed to make any such inquiries.

The record indicates that, except for attending the formal presentations made by Mr. Murray and Mr. Reville during the public hearings, neither the Mayor nor any member of his staff made an effort to ascertain exactly what was needed to carry out the desegregation orders. That the Mayor could have obtained the information is evident from prior events in the case.

As stated above, a similar funding dispute arose last year and ended with a consent order directing the payment of additional money. As part of the order, the Board and its staff were directed

> to fully cooperate with the Mayor of the City of Buffalo and his representatives in reviewing the operation, finances and activities of the Board, such cooperation shall include giving all information and reports reasonably requested by the Mayor or his representatives including materials generated by

> outside auditors of Board finances and said auditors shall be instructed by the Board to supply information and reports reasonably requested by the Mayor or his representatives . . . .

Order of August 14, 1981, at 2. This provision of the order was added at the insistence of the Mayor over the objections of the Board. The Mayor could have obtained any information desired through utilization of his Board of Education Review Committee.

Yet, at the time of the hearing in July, the Committee had not submitted reports. Moreover, the Mayor testified that no recommendations from the Committee came to his office. He also stated that, while he was kept informed in general terms of the meetings by Mr. Planavsky, he never reviewed the minutes of the meetings and "didn't learn much" about the Committee's recommendations. Tr., Vol. 3 at 67, 68.[12]

[12] The reports of the consultants hired by the Mayor's Board of Education Review Committee were made available to the court sometime after the hearing was closed. In an order dated August 13, 1982, the court held that the reports would not be considered as part of the record because they were not available during the hearing and the consultants who prepared them were not available for cross-examination.

The court notes, in addition, an unsolicited reply brief was filed by the City defendants on August 17, 1982. Because it was the understanding of the court and the other parties that reply briefs were not warranted, none of the other parties has submitted responding documents.

Finally, on August 18, 1982, the court received a document from the City defendants entitled "Motion of the Mayor and the Common Council to Correct the Record."

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None of the consultants hired by the Committee was called by the City to express his or her opinion regarding the needs of the Board, and it does not appear that the Mayor made use of this resource. This lack of inquiry is especially curious in view of the City's insistence upon the establishment of the Committee last year.

One of the primary witnesses for the City defendants during the hearing was Mr. Planavsky. When asked whether or not he took the school desegregation needs into account, Mr. Planavsky responded in the affirmative. It was clear from the testimony, however, that he, as well as the Mayor, eschewed a thorough investigation of the desegregation program and, instead, employed a mechanical formula in arriving at the amount of funds for the Board's operations and maintenance budget.

In making the specific allocation of funds to the Board, the Mayor and his staff worked upon two assumptions. The first was that the Board was just another department of the City and subject to the same

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It may be that these various documents contain useful information, and the consultants' reports should be of assistance to the Board and the City defendants in preparing their budget requests for next year. As far as the instant application is concerned, however, the record must be closed. With the BPSS scheduled to begin its 1982-83 school year on September 8, time is clearly of the essence. Therefore, rather than spur a second round of briefing, the court did not consider the arguments raised in the reply brief of the City defendants. Further, the court finds that the motion to correct the record is unnecessary, and it shall be denied.

limitations regarding the lack of funds. The second assumption was that the Board had been able to function adequately throughout all the prior years of the desegregation order. Therefore, there could be no reason to award the Board a proportionately larger increase in funds this year than it had received last year and the year before.[13] The record shows that the Mayor and his staff intended to award the Board approximately 92-93 percent of whatever amount the Board requested or, in the alternative, give the Board a 5.5 percent increase

[13] Mr. Planavsky stated:

> [T]his desegregation order of the Court has been carried out and, of course, we have been funding this all along. One thing that I had in my mind was the understanding that the Board of Education has in past years asked for a considerably higher figure than they have in fact received, and that the average of this has been in the neighborhood of about ninety-three percent; in other words, they have received about ninety-three percent of what they have actually asked for.

Tr., Vol. 2 at 6.

The Mayor stated:

> They asked for a hundred sixty point two million dollars, and we gave them ninety-two point eight percent of the money they requested. This is in comparison with all of the years that I have been Mayor, this is about the average of the monies that they received.

Tr., Vol. 2 at 177.

An alternative approach which the Mayor appeared to have utilized was to use the budget from last year as a base and add 5.5 percent of last year's allocation to that figure. *See* Tr., Vol. 2 at 185-87, 188-89.

over last year's budget.[14] This figure was one of the items taken into account by the City. During the hearing, Mr. Planavsky stated:

> [W]e looked at, generally speaking, we looked at what revenues were available. We looked at the needs of the Board of Education and then we used comparability and then based on those, generally speaking, we made our decision.

Tr., Vol. 2 at 62.

Mr. Planavsky was not very specific about the other information he took into account. (Tr., Vol. 2 at 64-72.) He produced a document which he said he used to analyze the Board estimate. (Exhibits 769 and 770.) His principal approach, however, was to slash all new jobs without finding out why they were requested. He stated:

> [W]hen I went through the Board's budget, I took all of the new jobs and I put them on my list here, because I thought that if it was a new position, and there were about three hundred of them, I didn't think they could possibly need three hundred new jobs.

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[14] Neither of these approaches would give the Board the desired increase in funds over last year's budget. This is because the base figure used by the Mayor did not reflect the amount of money actually used by the Board, including the large sums of federal aid which, as we discussed, are no longer available. Had these funds been included, the Mayor's $150,000,000 recommendation would be far less than 92-93 percent of the Board's request. Tr., Vol. 5 at 21-22.

Tr., Vol. 2 at 66.[18] From the record, it appears that the statement reflects the general attitude of the Mayor and his staff in performing their tasks. Funding was denied for new positions notwithstanding the impact of the denial of the funds on the desegregation effort.

This is supported by the testimony of the Mayor, who stated that in arriving at the $150,000,000 figure for Board use, he took into account the declining enrollment of about 1,185 pupils, the money that the Board was to receive from the State government, and the amount to be received by the tax levy in the City of Buffalo. Tr., Vol. 2 at 171. He stated that he "took into consideration State aid, the property taxes, the sales taxes and my other departments." Tr.. Vol. 2 at 212. Nowhere in his consideration is there any indication that the Mayor took into account the specific needs of the Board regarding the increased cost of complying with the desegregation order in the face of dwindling federal funds and the need for increased funds to comply with this court's orders in the *Andres* and *Bushey* cases regarding handicapped children. Even though it was his duty as a defendant to inquire into these areas, the Mayor operated under the assumption that the Board would take care of it all with

[18] Some of the positions which would have been eliminated include the additional teachers and teachers' aides, bus aides, and coordinators for bilingual programs. This approach of automatic elimination of any new position demonstrates Mr. Planavsky's disregard for the Board's needs, his lack of knowledge of the Board's needs, and his disregard for its commitments—including the desegregation program.

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an increase limited to a certain percentage over what it received last year.

In fact, as the testimony shows, the City reduced the amount of City revenues available to the Board of Education.

REVENUES FOR SCHOOLS			*CHANGE*	
	1981-82	*1982-83*	*Dollars*	*Percent*
OPERATIONS & MAINTENANCE				
City Tax Levy	$ 38.8	$ 38.3	$—0.5	—1.29%
Other	5.4	5.4	—	—
State Aid	84.7	93.3	8.6	10.15
Sales Tax	11.2	12.5	1.3	11.61
Miscellaneous	0.6	0.5	—0.1	—16.67
Court Order	2.0	0.0	—2.0	—100.00
Subtotal O & M	$142.7	$150.0	$ 7.3	5.12%
DEBT SERVICE				
Tax Levy	$ 5.9	$ 6.5	$ 0.6	10.17%
Other	.7	.5	—0.2	—28.57
Subtotal Debt Service	$ 6.6	$ 7.0	$ 0.4	6.06%
GRAND TOTAL	$149.3	$157.0	$ 7.7	5.16%

Exhibit 794 (emphasis by underscoring added).

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As the table indicates, there has been a reduction in local effort to support the BPSS and the desegregation program. Instead of providing an additional $8,000,000 more to the Board, as the Mayor claimed, the Board's share of revenues from the City's tax rolls is actually approximately $500,000 less than last year. The $8,000,000 increase for which the City takes credit comes from New York State aid which the State designates specifically for Board use.

Further evidence which shows that the Mayor did not perform his duty of inquiring into the desegregation needs of the Board is found in the fact that he was cautious in making up the budget and acknowledged other legal obligations of the City. The Mayor set aside substantial sums in reserve accounts to cover potential liability of the City from decisions which may be forthcoming from collective bargaining arbitrators and from the state courts.

The record shows that approximately $2,200,000 has been placed in a reserve account to cover any judgments that may be taken against the City for 1982-83. The Mayor testified that the money was allocated to insure that there would be adequate funds available to satisfy judgments which may be awarded to taxpayers whose property has been over-assessed and who sue under the decision of the New York State Court of Appeals in the case of *Hurd v. City of Buffalo*, 41 A.D.2d 402, 343 N.Y.S.2d 950, *aff'd*, 34 N.Y.2d 628, 355 N.Y.S.2d 369, 311 N.E.2d 504 (1974).

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Yet, many cities in the State face the possibility of similar judgments being taken against them. As was noted by the Board, however, local municipal governments adversely affected by the *Hurd* decision can expect to receive assistance from the State of New York in meeting these obligations. *See* Post-Hearing Brief of the Board at 18, and Exhibit A attached thereto.

In addition, there is another way in which the City could meet its obligations without endangering the success of the desegregation program, and that is by issuing short or long-term obligations. During the hearing, the Mayor stated that he is reluctant to borrow funds to pay the *Hurd* judgments, and there is no doubt that the Mayor's generally unsympathetic attitude towards debts has benefited the City.

The Board has provided the court with a memorandum from the New York Senate Finance Committee's Office of Fiscal Studies, dated May 14, 1982, which pertains to Buffalo's fiscal situation (Exhibit A to the Board's Proposed Findings of Fact and Conclusions of Law). The report states that the City has

> reduce[d] its cumulative deficit from $37.5 million in June of 1975 to almost zero this year—quite a feat for a unit of government located in an area of the State experiencing severe economic contractions.

A substantial part of this reduction occurred during the present Mayor's term of office through his efforts and those of his staff.

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Nevertheless, the same report noted with disapproval the Mayor's $4,700,000 in budgeted reserves because none of them, including the $2,000,000 judgment reserve, is an "absolute necessity." *Id.* at 3-4. In addition, the Mayor has set up a second discretionary reserve fund in the amount of $1,500,000 for salary negotiations.

Throughout this dispute, the City has emphasized the fact that City Fire and Police Department employees are to receive a salary increase of only 2 percent of current salaries for fiscal year 1983. *See* Affidavit of the Mayor, Tr., Vol. 2 at 133-35. In fact, however, the Mayor is well aware that this 2 percent figure represents the City's offer and not a final resolution of what it will have to pay these employees. Pursuant to the New York State Taylor Law, the collective bargaining agents for the police officers and the firefighters are entitled to seek binding arbitration for wage disputes.

The Mayor testified that the negotiations for a new contract for the Buffalo firefighters have already reached an impasse and, while it is not certain, there is a distinct possibility that the police officers' union will be dissatisfied with a 2 percent wage increase and will also take the matter to binding arbitration. He acknowledged that the City will have to honor whatever increase is eventually awarded to the public employees by the public arbitration panel. And, if the Mayor has underestimated the amount of wage increase awarded by the arbitrator and the money in the reserve account is insufficient, the City may have to borrow money to pay for the increase.

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Certainly, the obligation of the City to fund the desegregation program is equally important, and the City may borrow to pay for this obligation also.

Judgments, court orders, and arbitration decisions are not foreign to the Mayor and, in setting aside these reserve funds, he has acknowledged the City's obligation to follow court orders. In contrast to his recognition of the binding nature of the *Hurd* decision and an arbitration award, the budget does not contain a reserve account to provide additional desegregation funds if required by this court.

This decision is not intended to be an exhaustive review of all the arguments raised by the parties during the hearing and in their post-hearing briefs. Instead, the court shall note that, in addition to the issues discussed, we have carefully considered all of the arguments and objections raised by the Mayor and the Common Council during the hearing and in their post-hearing brief. These arguments do not change our holding that the City must provide an additional $7,400,000 to the Board.

Some arguments of the City defendants, however, require brief discussion. The first involves the Mayor's contention that the Board's application for additional funds is premature. This is based on the City's argument that the Board should first prepare a formal, line-by-line budget to show that it could not operate within the $150,600,000 currently allocated. Until this task is completed, the City defendants argue, they and the court have no way of knowing whether items can be cut which would not harm the desegregation program.

APPENDIX (ii)—Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered August 27, 1982, and reported at 547 F.Supp. 468

Under the New York State Education Law, the Board must "prepare annually an itemized estimate for the current or ensuing fiscal year of such sum of money as it may deem necessary . . . ." New York State Education Law §2576. The Board has no power to appropriate funds but is dependent upon the City to finance its expenditures. Under the State law, however, the City cannot dictate to the Board how these funds should be spent. That decision is left to the expertise of the Board and its staff.

To require the Board to prepare a second itemized estimate and to allow the City defendants to examine the budget on a line-by-line basis, directing the Board to cut out one program or another, or to cut back on certain expenditures as opposed to others, would give the Mayor and Common Council greater control over the educational system than is contemplated under the State law.

Further, the court finds that an itemized estimate is not necessary for our decision today. The Board's burden was to show that additional funds must be provided in order for the Board to desegregate the schools. The Board has adequately demonstrated that the cost of desegregating the schools and complying with other orders of the court has increased considerably and that, in the face of a sweeping cutback of federal aid, funds from its codefendants have not been forthcoming. The

holding of our decision today remains intact. The Board has carried its burden.[18]

Another prong of this argument is the City's contention that the Board should have followed the procedures of Education Law §2576(6) which provides:

> A board of education may, to meet emergencies which may arise, submit a special estimate in which items for extraordinary expenses may be submitted to meet such emergencies. Such estimate shall contain a complete statement of the purposes for which the items are requested and the necessity therefor. The same method of procedure shall be followed in submitting such estimate and such estimate shall be subject to the same consideration and action as is required in the submission, consideration and action upon the regular annual estimate submitted by a board of education. The common council or other legislative body in such city shall have power to make the appropriations requested by a board of election in such special estimate.

The court rejects this argument also. We note first that it is not clear that section 2576(6) is applicable to

[18] We note, in addition, that it is not practically feasible to require the Board to prepare the kind of detailed, itemized budget the City defendants request. Schools are scheduled to open on September 8, 1982, a very short time away. The motion was brought and the hearing conducted in an expedited fashion in view of the sharp time constraints.

this case. It may be intended to apply only to emergency situations which arise during the school year, such as natural disasters, and not to situations which are foreseeable, such as a collapse of the BPSS and the desegregation program due to a lack of funds.

Secondly, it is clear that the Board has made application for increased funds to the City. The City has been informed of the developments regarding federal aid cutbacks and increased needs and has refused to advance additional funds. It would be futile for the court to require the Board to make yet another application for the same relief.

The next issue involves the surplus of funds from the last school year that the Board allegedly has at its disposal. There has been much discussion by the City defendants regarding these extra funds. It is sufficient to note, however, that there is no evidence in the record to indicate that the Board has, or will have, a surplus of funds when the final fiscal accounting is rendered.

Similarly, while there was a great deal of discussion during the hearing regarding the possibility of the Board's use of capital funds to supplement its operations and maintenance budget, the record shows that this cannot be done. The Board has demonstrated that the uses to which these funds can be made are limited. They may be utilized for construction and reconstruction of facilities but not for repairs and maintenance of school buildings. Tr., Vol. 4 at 136, 138-42.

APPENDIX (ii)—Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered August 27, 1982, and reported at 547 F.Supp. 468

The final issue remaining for decision is the plaintiffs' motion for further desegregation. Plaintiffs have submitted a proposed plan to bring the six elementary schools remaining outside the court's guidelines into compliance with our orders. The Board has opposed this plan. The Board's position is that given the size and racial makeup of the school children of the City, adoption of the plaintiffs' plan would cause schools which are now racially balanced to be thrown outside the court's guidelines.

This issue was explored in depth during the hearing. In support of their motion, plaintiffs relied upon the testimony of Mr. Murray. Mr. Murray stated his position as being opposed to any additional pupil redistribution at this time.

Opposition was also voiced by the intervenors representing the class of handicapped children in the BPSS. According to the intervenor's analysis as set forth in its post-hearing brief, plaintiffs' plan would be detrimental to trainable mentally retarded children and would inhibit compliance with the consent degree rendered in the *Andres* case.

Having reviewed the plan submitted by the plaintiffs, the testimony from the hearing, and the submissions from the parties and the Hispanic and Handicapped Intervenors, the court is convinced that the plaintiffs' plan should not be implemented. The record shows that the plan would be financially burdensome, disruptive, and, most importantly, it would not significantly benefit the desegregation effort. The plaintiffs' motion is therefore denied.

APPENDIX (ii)—Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered August 27, 1982, and reported at 547 F.Supp. 468

The court notes that in our order of June 30, 1982, we stated that "[a]fter the hearing, we hope to be in a position to issue a final order, ending the court's role in *Arthur v. Nyquist*." We now find that it is not possible to do so at this time. Although plaintiffs' proposal has been rejected, there are schools which remain unbalanced. When the Board made its representations regarding its plan for the coming year, its representatives assured the court that the Board's staff would continue to review the data and determine whether additional remedial action is feasible. *See* Order of May 5, 1982. Further, the specific needs of the handicapped and Hispanic school children must be addressed, and the interrelationship of these special needs and special programs, within the desegregation order. Clearly, there will be further meetings and future orders in this case. For the present, the court holds that the Board's plans for school year 1982-83 shall be implemented as scheduled on September 8, 1982.

To summarize, the court grants the application made by plaintiffs and supported by the Board and directs the Mayor and the Common Council to make available to the

APPENDIX (ii)—Opinion of the United States District Court for the Western District of New York, per Curtin, Ch. J., dated and entered August 27, 1982, and reported at 547 F.Supp. 468

Board an additional $7,400,000. The motion of the plaintiffs to modify and amend the plan is denied.[17]

So ordered.

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[17] At this time, it may be useful to look ahead to next year and the years thereafter. It is obvious that the limited role of the court ought to and must come to an end. This order was issued most reluctantly, and only after carefully considering possible alternatives. It was only done because it was absolutely necessary to carry out prior orders of this court and the United States Court of Appeals. It cannot be said that a similar order will be appropriate next year or thereafter.

In the coming months, it will be the obligation of the Board and staff to inform the Mayor, his fiscal officers, and the Common Council of its perceived needs for the future. It is the obligation of the Mayor and others to question reasonably and to become informed about the problems the Board has in providing educational services within the law and the mandate of the court. Last year when the Mayor insisted upon the formation of a committee to review Board practices, the court agreed that it was a good idea and made its formation a part of the order, over the objection of the Board. I still believe that the committee can perform a useful function, but its success depends upon the good will and cooperation of all concerned. It certainly is the responsibility of the Board to continue to review and analyze its procedures with an eye to providing an appropriate education to the students as economically as possible.

Lastly, although the necessarily imposed series of integration orders have placed added burdens on our City, there have also been substantial benefits to the students and to the community at large. Good schools are integral to the civic health. Continued improvement will result from understanding and cooperation.

APPENDIX (iii)

Judgment of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983

UNITED STATES COURT OF APPEALS

For The Second Circuit

Civ-1972-325

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of July one thousand nine hundred and eighty-three.

United States Court of Appeals
Second Circuit
Filed
Jul 22 1983
A. Daniel Fusaro, Clerk

Present:
HON: IRVING R. KAUFMAN
HON: WILLIAM H. TIMBERS
HON: JON O. NEWMAN
Circuit Judges,

Filed
Aug 29 8:41 AM '83
U.S. District Court
W.D. of N.Y.

APPENDIX (iii)—Judgment of the United States Court of Appeals for the Second Circuit dated and filed July 22, 1983

GEORGE ARTHUR, *ET AL.*,
Plaintiffs-Appellees,

and

COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, *ET AL.*,
Plaintiffs-Intervenors-Appellees,

vs.

EWALD P. NYQUIST, *ET AL.*,
Defendants,

JAMES D. GRIFFIN, *ET AL.*,
Defendants-Appellants.

82-7690.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A TRUE COPY
A. DANIEL FUSARO, CLERK
By VICTORIA C. SATTON
Deputy Clerk

A. Daniel Fusaro
Clerk
EDWARD J. GUARDARO
by: Edward J. Guardaro
Deputy Clerk

APPENDIX (iv)

Excerpts of trial exhibits

AFFIDAVIT OF JOSEPH T. MURRAY IN SUPPORT OF MAY 27, 1982 ORDER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GEORGE ARTHUR, *et al.*,

Plaintiffs,

vs.

EWALD P. NYQUIST, *et al.*,

Defendants.

Civil No. 1972-325.

State of New York
County of Erie
City of Buffalo
} ss:-

JOSEPH T. MURRAY, being duly sworn, deposes and says:

1. That I am the Associate Superintendent of Instructional Services.

2. That I have occupied this position since July 1, 1975. Prior to becoming Associate Superintendent of Instructional Services, I was Assistant Superintendent for Curriculum and Evaluation, and have spent 16 years in various other positions in the Buffalo Public School System including Buildings Principal, Assistant Principal and Helping Teacher.

3. That my present responsibilities include management and supervision of the Instructional Division including all principals, teachers and support staff, and since 1976 I have been assigned primary responsibility for the development and implementation of each phase of the School District's desegregation remedy.

4. That I am thoroughly familiar with the needs of the School System as they relate to the commitments of the staff, Superintendent and Board of Education under Phase IIIx as approved by the May 19, 1981 Order of this Court, and have given testimony and provided exhibits and other information relating to those needs on numerous occasions.

5. That I am also familiar with the additional needs of the School System which are related to the implementation of programs for pupils with special needs as required by the State and Federal laws, rules and regulations.

6. That approximately $18,147,725 were direct expenditures in implementation of the desegregation program ordered by the Court, including $7,930.550 for the transportation of pupils attending schools outside their immediate neighborhoods for purposes of desegregation. (See Exhibit A).

7. Increased costs to implement the desegregation program for the 1982-83 school year is $2,084,247. (See Exhibit A).

8. Increased special needs for handicapped pupils is $1,280,450 plus transportation cost of $290,500 for a grand total of $1,506,950. (See Exhibit B).

APPENDIX (iv)—Excerpts of trial exhibits

9. The continuation of our existing programs, the implementation of the components of Phase IIIx and the program requirements of pupils with special needs cannot be accomplished with budget appropriations less than $156.5 million.

10. Actually, a realistic effort to maintain the pace of the improvements in the quality of educational services we have been able to achieve since 1976 will require in excess of $160 million.

11. Upon receipt of information that the Common Council recommended an appropriation of $149.1 million for the Board of Education, I was instructed to examine methods to reduce the School System's budget by approximately $10.1 million.

12. I have estimated the costs related to implementing our desegregation program which were previously funded by the Emergency School Aid Act as $5,490,248.13. This is not part of our $160.2 million budget request but is needed to carry out our desegregation program. (See Exhibit C).

13. I have estimated the added cost of implementing Phase IIIx for the 1982-83 school year to be $3,444,866. This is $328,476 over the cost of implementing Phase IIIx for the 1981-82 school year. (See Exhibit D).

14. Attached as Exhibit E is a listing of reductions which have been considered but rejected in part because of their severe, detrimental impact upon our ability to comply with the May 19, 1981 Court Order and the resulting drastic impairment of any chance to continue the successful desegregation of our schools. (The Board has changed its regulations regarding Handicapped Education resulting in a reduction of $906,875.)

15. I am not aware of any reductions in program, personnel, plant or pupil services which can be made by the Buffalo Public Schools sufficient to permit us to operate on a budget of only $149,100,000 unless we are relieved of our obligation to continue the desegregation effort ongoing in this School System.

16. Any such reductions will obviously impair our ability to comply with the Orders of this Court and is inconsistent with our desire to assure equal educational opportunity to all pupils.

17. I have concluded that the pupils of the Buffalo Public School System will be better served by a mandate to the City to provide sufficient funding for our planned programs during 1982-83 rather than be deprived of such programs because of financial deficits.

JOSEPH T. MURRAY
Joseph T. Murray

Subscribed and sworn to before me,
this 3rd day of June, 1982.

WILLIAM E. CAREY
Commissioner of Deeds, City of
Buffalo, New York
My Commission Expires 12/31/82

APPENDIX (iv)—Excerpts of trial exhibits

EXHIBIT A ATTACHED TO FOREGOING AFFIDAVIT OF MURRAY

MANDATED COSTS INTEGRATION PROGRAM 81/82 - 82/83

		6-1-82	
	81/82		*82/83*
ELEMENTARY			
145 Teachers (Magnets, E.C.C.'s & Academies)	2,436,000		3,107,495
174 Aides (Pre-K, K, E.C.C.'s & Academies)	1,305,000		1,819,692
Equipment, Supplies, Books	1,500,000		1,500,000
SECONDARY			
Research Team (2 Teachers & 1 Aide)	43,210		53,320
57.7 Teachers (Magnets 7-12, Spec. Subj.)	969,360		1,236,568
PLANT DIVISION			
Renovation, Remodeling & Painting	462,000		400,000
TRANSPORTATION			
Cottrell	5,420,000		5,745,200
Shuttle Phase II	85,000		90,000
Shuttle Voc. Tech.	162,000		171,720
7th and 8th Metro	302,000		470,000
Bus Aides	785,795		998,315
Computer Costs	137,798		100,000
Trans. Staff	355,315		355,315
(Sub Total) 7,247,908		7,930,550	
MISCELLANEOUS			
Retirement of Deficit	2,100,000		2,100,000
TOTAL	16,063,478		18,147,725

APPENDIX (iv)—Excerpts of trial exhibits

EXHIBIT B ATTACHED TO FOREGOING AFFIDAVIT OF MURRAY

June 1, 1982

Mandated Handicapped Education Costs
1982-83 Budget Request

When 160.2 budget was prepared in January, 1982 the Handicapped Education Program was listed as:

51 Teachers
6 Psychologists
1 Supervisor
100 Aides

Supplies - Test Items

At a cost of: $2,213,251

There is also an item for transportation

At a cost of: $ 290,500

On March 26, 1982 the Board of Regents took action that gave school boards an option on class size which allowed the Board to reduce its request by:

16 Teachers
50 Aides
1 Supervisor

Reducing its need to: $1,280,450

The transportation remains at: $ 290,500

The mandated cost for handicapped education in 1982-83 is now:

$1,570,950

APPENDIX (iv)—Excerpts of trial exhibits

EXHIBIT C ATTACHED TO FOREGOING AFFIDAVIT OF MURRAY

BOARD OF EDUCATION—CITY OF BUFFALO

INTEROFFICE MEMORANDUM

Date June 4, 1982

Subject:

To: Joseph T. Murray, Associate Superintendent of Instructional Services

From: Richard J. Evans, Assistant Superintendent of Elementary Education

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These teachers and services must be picked up from some funding source to implement the desegregation order.

Staffing—Teachers/Aides/Admin. (ESAA Funds)

ECC POSITIONS

8	Coordinators	$ 240,000
1	Reading Specialist	30,000
1	Math Specialist	30,000
116	Aides	1,392,000
		1,692,000

3 - 8

7	Coordinators	210,000
28	Aides	216,000
		426,000

Phase I (4, 11, 18, 43, 45, 51, 77, 80)

.6	Reading	18,000
.6	Math	18,000
		36,000

APPENDIX (iv)—Excerpts of trial exhibits

Phase II (63, 39, 68, 53, 74, 56, 3, Buffalo Alternative)

1.5	Foreign Language	$ 45,000
3.7	Reading/Math Teachers	110,000
1.1	Resource	33,000
		188,000

Southside and #64

5.4	Reading/Math	162,000
		162,000

Southside

1	Human Relations Teacher	30,000
1	Reading Teacher	30,000
1	Math Teacher	30,000
1	Community Aide	12,000
		102,000

Futures Academy

1	Aide	12,000

Martin Luther King Jr. (#39)

2	Aides	24,000

#19

1	Native American Resource Specialist	22,000

#56

1	Creative Resource Teacher	30,000

ECC/Academies (from Supplemental Basic)

60	Aides	720,000

Campus East

2.2	Reading/Math Teachers	66,000

APPENDIX (iv)—Excerpts of trial exhibits

Campus West		
3	Coordinators	$ 90,000
Waterfront		
1	Library Media Specialist	30,000
2.9	Arts Teachers	49,300
.5	Home Economics	15,000
.5	I.A.	15,000
		109,300
Academic Challenge Center		
3	Reading/Math Teachers	90,000
.4	Library/Media Specialists	12,000
		102,000
Montessori		
1	Community Resource Leader	10,000
1.1	Arts Teachers	18,700
.4	Library/Media Specialists	12,000
4	Aides	48,000
Consultants Montessori		1,200
		89,900
Follow Through		
2	Coordinators	60,000
Build Academy		
1.5	(Foreign La/Writing/I.A./Art)	45,000
.5	Coordinator	15,000
.2	Foreign Language	6,000
2	Community Aides	24,000
		90,000
Science and Math Academy		
1	Coordinator	30,000
	TOTAL:	$3,839,400

APPENDIX (iv)—Excerpts of trial exhibits

Addendum

NEW ACADEMIES - SCHOOLS 53, 74

A.	Texts and Supplemental Material from SC #53	$	39,511.14
	Supplemental Mat./Supplies/Equipment #53		27,689.20
			67,200.34
	Texts and Supplemental Material from SC #74		19,958.89
	Supplemental Mat./Supplies/Equipment #74		27,689.20
			47,648.09
	TOTAL Supplies/Equipt./Text =	$	114,848.43
B.	*Staffing*		
	2 Coordinators		60,000.00
	4 Aides		48,000.00
			108,000.00
	TOTAL to Establish New 3-8s =	$	222,848.43

Secondary Schools

Secondary (Bennett, Kensington, Grover, Lafayette, Riverside and McKinley)

6.5	Math Lab Teachers	195,000.00
3	Coordinators (12 at 25%)	90,000.00
.6	Home School Teacher	18,000.00
.6	Social Worker	18,000.00
3.5	Guidance Counselor	105,000.00
10	Aides	120,000.00
		546,000.00

Secondary

1	Home School Teacher (Lafayette)	30,000.00
12	Unified Subject Teachers	360,000.00
4	Aides	48,000.00
		438,000.00

APPENDIX (iv)—Excerpts of trial exhibits

Magnet

1. *Performing Arts*

1	Coordinator	30,000.00
1.3	Fine Arts Instructors	39,000.00
6	Aides	72,000.00
1	Artist in Residence	24,000.00
		165,000.00

2. *Traditional*

1	Communications Specialist	30,000.00
3	Reading/Math Teachers	90,000.00
.5	Foreign Language	15,000.00
3	Aides	36,000.00
		171,000.00

3. *City Honors*

1	Guidance	30,000.00
1	Resource	30,000.00
4	Community Aides	48,000.00
		108,000.00

Total Secondary Schools	1,428,000.00
GRAND TOTAL:	5,490,248.43

APPENDIX (iv)—Excerpts of trial exhibits

EXHIBIT D ATTACHED TO FOREGOING AFFIDAVIT OF MURRAY.

Cost Estimate
to
Continue Phase IIIX

6/1/82

Early Childhood Centers

1981-82		*1982-83*
$ 299,600	Plant Dept. Costs	$ –
196,800	Supplies & Equipment	40,000
620,000	Teachers	857,240
241,040	Aides	418,320
180,000	Transportation	198,000
$1,537,440		$1,513,560

3-8 Academies

$ 279,860	Supplies & Equip	$ 200,000
651,000	Teachers	900,102
177,590	Aides	308,511
414,000	Transportation	455,400
$1,522,450		$1,864,013

G.A.T.E. Program

$ 15,000	Supplies & Equipment	3,000
46,500	Teachers	64,293
$ 56,500		$ 67,293
$3,116,390		$3,444,866

APPENDIX (iv)—Excerpts of trial exhibits

EXHIBIT E ATTACHED TO FOREGOING AFFIDAVIT OF MURRAY.

INSTRUCTIONAL DIVISION

PROJECTED CUTS FROM 1982-1983 BUDGET REQUEST

2	Elementary Principals	$ 69,030
10	Elementary Assistant Principals	357,160
3	Secondary Principals	115,650
2	Secondary Assistant Principals	74,448
4	Central Office Administrators	158,474
	Handicapped Education (200.14 option)	996,875
10	Helping Teachers (Elementary)	170,330
2	Helping Teachers (Secondary)	34,066
10	Reading Specialists	228,160
6	Mathematics Specialists	131,838
25	Instrumental Music Teachers	433,125
52.5	Elementary Teachers	903,593
37.5	Secondary Teachers	643,118
36	Primary Art, Music, Phys. Ed. Teachers	877,896
24.2	Librarians	581,018
15	Guidance Counselors	395,640
25	Attendance Teachers	701,114
17	Security Officers	228,350
	Extra Curricular Activities	75,000
	P.S.A.L. - 7th and 8th Grades	25,000
	P.S.A.L. - Intramurals	80,000
	Varsity Sports	558,984
62.5	Pre-Kindergarten Teachers	1,066,687
70	Kindergarten Teachers	1,192,310
		$10,097,866

June 1, 1982

APPENDIX (iv)—Excerpts of trial exhibits

"PAGE 1" ANNEXED TO FOREGOING ANSWERING AFFIDAVITS OF RAICHLE, GRIFFIN AND PLANAVSKY

INSTRUCTIONAL DIVISION
BUDGET REQUEST
1982-83

January 13, 1982

NON MANDATES	
Extra Curricular Activities	$ 75,000
P.S.A.L. - 7th and 8th	25,000
P.S.A.L. - Intramurals	80,000
Varsity Sports (Includes $155,218.00 -Soccer and Wrestling Teams)	558,984
Alternative High School	1,395,594
Buffalo Evening High School	113,142
17 - Security Officers (0)	288,356
25 - Attendance Teachers (0)	701,114
50 - Guidance Counselors (5)	1,408,250
9 - Social Workers (7)	251,397
11 - Psychologists (13)	319,957
24.2 - Librarians	581,018
40 - Elementary Physical Education Teachers	1,033,880
25 - Elementary Art Teachers	585,900
25 - Elementary Music Teachers	596,875
14 - Senior Subject Social Studies Teachers	366,464
15 - Second year Math Teachers	329,595
62.5 - Pre-K Teachers	1,066,687
62.5 - Teacher Aides	540,812
36 - Art, Music and Physical Education (Primary)	877,896

APPENDIX (iv)—Excerpts of trial exhibits

TEACHERS (TO INCREASE CLASS SIZE)

30 Teachers	544,320
60 Teachers	1,096,902
90 Teachers	1,658,232
120 Teachers	2,226,636
150 Teachers	2,801,898

ADMINISTRATION (Instructional)

23 Central Office Teachers Assigned	653,895
8 Integration Home-School Coordinator	217,373
20 Clerks	298,520
20 Helping Teachers (Schools)	468,720
1 Coordinator	29,634
6 CLIME Teachers - eliminates Math clinicians in each Board District	131,838
10 Reading Specialists - eliminates Reading specialists services in all schools	228,160
Central Office Administrators Assistant Superintendents, Directors, Supervisors, Project Administrators	1,391,324

Above salaries do not include pensions.

APPENDIX (iv)—Excerpts of trial exhibits

EXCERPTS OF EXHIBIT 23 ANNEXED TO FOREGOING ANSWERING AFFIDAVITS OF RAICHLE, GRIFFIN AND PLANAVSKY.

[1]

AGREEMENT BETWEEN THE BOARD OF EDUCATION OF THE CITY OF BUFFALO AND THE BUFFALO TEACHERS FEDERATION

THIS AGREEMENT entered into this 8th day of September, 1981, as amended, by and between THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, hereinafter sometimes called the "BOARD", and THE BUFFALO TEACHERS FEDERATION, hereinafter sometimes called the "FEDERATION".

WITNESSETH:

WHEREAS, the Federation, as the exclusive representative of the teaching personnel of the Board, has all of the rights and privileges granted to it by the Taylor Law; and

WHEREAS, the Board and the Federation recognize and declare that providing quality education for the children of the City of Buffalo is their mutual aim; and

WHEREAS, the parties have agreed to negotiate in good faith with respect to the salaries, welfare provisions, teaching conditions, hours, and certain matters of educational policy for all of the teaching personnel employed by the Board; and

WHEREAS, the parties, following extended and deliberate negotiations, have reached certain understandings which they desire to memorialize for the enhancement of public education and the common good of the public;

NOW, THEREFORE, in consideration of the following mutual covenants, it is hereby agreed as follows:

ARTICLE I
Statement of Recognition

A. The Board hereby recognizes the Federation as the exclusive representative of all department chairpersons, classroom teachers, guidance counselors, school social workers, attendance teachers, school psychologists, reading teachers, ESEA teachers, librarians, speech therapists, helping teachers, administrative assistants, teachers-in-charge, reading specialists, day school Adult Learning teachers and any other teachers paid on the

* * *

[76] APPENDIX D
Class Size

The Buffalo Teachers Fedeation and the District, recognizing the educational value of class size limitations, but mindful of the Board of Education's financial dependency on the City of Buffalo, hereby agree for the life of this contract:

1. The class limitations shall not exceed 33 for the primary grades and 35 for Grades 4-6.

2. That the class size limitation for regular secondary class loads shall be 170.

Should the level of funding for the 1982-83 school year be inadequate to maintain the above stated limits, the Federation and the District shall meet to determine appropriate limits for that school year.

APPENDIX (iv)—Excerpts of trial exhibits

EXCERPT OF CITY'S CHART OF O & M BUDGET—INTEGRATION REQUESTS AND APPROPRIATION

Integration Program:	*Record Reference*	*Amount Requested For 1981-82*	*Amount Requested For 1982-83*	*Increase Requested For 1982-83*
The Board's entire basic Desegregation Program	(A. 107; R. 38—Ex. A).	$ 16,063,478	$ 18,147,725	$2,084,247
Integration Phase IIIx Program	(A. 108-9, 111; R. 38—Ex. D).	3,116,390	3,444,868	328,476
Handicapped Program (mandated by N.Y. State Comm. of Ed.)	(A. 108; R. 38—Ex. B).	- - - -	1,570,950	1,570,950
Teachers formerly under Fed. ESAA Program	(A. 108; R. 38—Ex. C).	- - - -	(5,490,248)*	*"Not part of Board's request"
Total Integration Request:				
Excluding Handicapped:.....		$ 19,179,868	$ 21,592,593	
Including Handicapped:		$ 19,179,868	$ 23,163,543	
Increase in 1982-83 Integration Requirements over 1981-82 Integration Requirements:				
Excluding Handicapped:.....				$2,412,723
Including Handicapped:				$3,983,673
City's O & M Budget Appropriation	(A. 157-8; R. 38—Exs. 4, 12 & 13).	141,242,603	149,129,822	
Increased Total (1982-83 over 1981-82):				$7,887,219

APPENDIX (v)

Text of pertinent New York Statutory Provisions

[404] N.Y. EDUCATION LAW

§2576. Annual estimate

1. The board of education in each city having a population of less than one million shall prepare annually an itemized estimate for the current or ensuing fiscal year of such sum of money as it may deem necessary for the purposes stated in this section, after crediting thereto the amount anticipated in the next apportionment of school funds from the state and the estimated amount to be received from all other sources. Such itemized estimate in such cities shall be filed at such times and in such manner as city departments or officers are required to submit estimates for such departments or officers. The board of education in each other city shall prepare annually an itemized estimate for the ensuing fiscal year and file the same on or before the first day of September. Such estimates shall be for the following purposes:

a. The salary of the superintendent of schools, associate, district or assistant or other superintendents, examiners, directors, supervisors, principals, teachers, lecturers, special instructors, auditors, medical inspectors, nurses, attendance officers, clerks, custodians and janitors and the salary, fees or compensation of all other employees appointed or employed by said board of education.

b. The other necessary incidental and contingent expenses, including ordinary repairs to buildings and the purchase of fuel and light, supplies, textbooks, school apparatus, books, furniture and fixtures and other articles and service necessary for the proper

maintenance, operation and support of the schools, li-
[405] braries and other educational, social or recreational affairs and interests under its management and direction. The provisions of this section in regard to the purchase of light shall not apply to a city having a population of one million or more.

c. The remodeling or enlarging of buildings under its control and management, the construction of new buildings for uses authorized by this chapter and the furnishing and equipment thereof, the purchase of real property for new sites, additions to present sites, playgrounds or recreation centers and other educational or social purposes, and to meet any other indebtedness or liability incurred under the provisions of this chapter or other statutes, or any other expenses which the board of education is authorized to incur. Nothing contained in this chapter shall prevent the financing, in whole or in part, of any expenditure enumerated in this subdivision pursuant to the local finance law.

2. In the city school districts of Syracuse, Rochester and Yonkers such estimate shall be filed with the mayor or city manager. Such officer shall place such estimate before the board of estimate and apportionment or other similar body at the same time and in the same manner as estimates from city departments or officers are placed before said board or body, and such estimate shall thereafter be subject to the same consideration, action and procedure as all other estimates from city departments or officers. The said board or body may increase, diminish or reject any item contained in said estimate, except for fixed charges for which the city is liable. When such estimate is adopted, the said board or body shall file it with the common council.

APPENDIX (v)—Text of pertinent New York Statutory Provisions

[3. Repealed.]

4. In a city which had, according to the federal census of nineteen hundred forty, a population of four hundred thousand or more but less than one million such estimate shall be filed with the officer authorized to receive other department estimates and the same acted on by such officer and by the council of such city in the same manner and with the same effect as other department estimates. The council is also authorized, in its discretion, to include in such budget a sum for any of the purposes enumerated in paragraph c of subdivision one of this section, and any further amount for such purposes as may be authorized by a tax election held in such city pursuant to the provisions of this chapter. After the adoption of such budget the council shall cause the amount thereof to be included in the tax and assessment roll of the city and the same shall be collected in [406] the same manner and at the same time as other taxes of the city are collected, and placed to the credit of the board of education.

5. In a city which had, according to the federal census of nineteen hundred forty, a population of one million or more such estimate shall be filed with the mayor. If the total amount requested in such estimate shall be equivalent to or less than an amount equal to the average proportion of the total expense budget of such city, as amended, appropriated for the purposes of the city school district of such city in the three fiscal years of such city immediately preceding the year for which said estimate is filed, the city shall appropriate such amount. If the total amount contained in such estimate shall exceed the amount so computed, such estimate

shall, as to such excess, be subject to such consideration and such action by the board of estimate, the council, and the mayor as that taken upon departmental estimates submitted to the mayor. The city is authorized to make additional appropriations for educational purposes authorized by this chapter. The board of education shall administer all moneys appropriated or available for educational purposes in the city, subject to the provisions of law relating to the audit and payment of salaries and other claims by the comptroller.

6. A board of education may, to meet emergencies which may arise, submit a special estimate in which items for extraordinary expenses may be submitted to meet such emergencies. Such estimate shall contain a complete statement of the purposes for which the items are requested and the necessity therefor. The same method of procedure shall be followed in submitting such estimate and such estimate shall be subject to the same consideration and action as is required in the submission, consideration and action upon the regular annual estimate submitted by a board of education. The common council or other legislative body in such city shall have power to make the appropriations requested by a board of education in such special estimate.

7. A board of education shall not incur a liability or an expense chargeable against the funds under its control or the city for any purpose in excess of the amount appropriated or available therefor or otherwise authorized by law.

APPENDIX (v)—Text of pertinent New York Statutory Provisions

8. In a city in which, under the statutes in effect prior to June eighth, nineteen hundred seventeen, it was provided that the estimate of expenditures for the support and maintenance of the public schools of the city shall not be less than a specified per capita sum, based on the number of pupils enrolled in the public schools of the city, the amount authorized or required to [407] be included in the estimate of school expenditures as provided in this article shall not be less than the per capita sum specified in such statute.

9. In any city in which the annual estimate and budget of the board of education is subject to change by some other city authority, such annual budget shall give detailed schedules for all purposes and shall indicate the entire amount to be expended by the board of education for school purposes, including the amount to be levied for debt service on account of bonds, notes or certificates of indebtedness issued for school purposes, whether the amount to be expended is on account of local revenues or to be derived from state aid. The total amount on account of local revenues and the total amount to be derived from state aid shall be separately indicated. In any such city having a population of less than one million the annual estimate and budget shall contain a statement of the amount of revenues over and above those set forth in the budget for the preceding year, which the board of education estimates it will receive in the current year. Any surplus funds shall at the close of the fiscal year be transferred to an existing capital fund or appropriated by the proper authority to other school purposes.

L.1947, c. 820; formerly § 2526; amended L.1948, c. 261, §§ 1, 2; L.1949, c. 687, § 37; L.1950, c. 89; renumbered § 2576 and amended L.1950, c. 762, §§ 2, 14-19; L.1957, c. 72; L.1961, c. 637, §§ 1, 2; L.1964, c. 576, § 27; L.1964, c. 901; L.1971, c. 139, §§ 1, 2; L.1972, c. 65, § 8; L.1976, c. 132, § 1.

CITY OF BUFFALO CHARTER

[36] *Article 3.—The Common Council*

Sec. 39. Action on Budget.

At the first meeting of the council after the submission to it by the mayor of the annual budget, the council shall proceed to a consideration thereof.

The council may strike out or reduce items therein and may add thereto items of appropriation, provided that such additions are stated separately and distinctly from the original items of the budget and refer each to a single object or purpose.

If no additions are made by the council, the budget, as passed by it, shall be deemed to have been adopted without any action of the mayor; if, however, the budget as passed by the council contains any such additions, it must be presented by the city clerk to the mayor on or before the twenty-second day of May of each year for his consideration of such additions. If the mayor approves all the additions, he shall affix his signature to a statement thereof and return the budget and such statement to the city clerk. The budget, including the additions as part thereof, shall then be deemed to have been adopted. The mayor may object to any one or more

of such added items and in such case shall append to the budget a statement of the added items to which he objects with the reasons for his objections and shall return the budget with his objections to the city clerk who shall present the same to the council at its next stated meeting. The council shall thereupon enter the objections upon its journal and proceed to reconsider the additions so objected to. If upon such reconsideration two-thirds of all the members constituting the council vote to approve such additions, or any of them, notwithstanding the objections of the mayor, the budget with the additions so approved, together with any additions not so objected to by the mayor, shall be deemed to have been adopted. If the budget with additions is not returned by the mayor to the city clerk with his objections within ten days after its presentation to him, it shall be deemed to have been adopted.

If a budget has not been adopted, as herein provided, on or before the eighth day of June of each year, then the budget, [37] as submitted by the mayor, including all additions to which he has failed to object, shall be the budget for the ensuing fiscal year. (As amended by L.L. 1960, No. 2; L.L. 1963, No. 6; L.L. 1966, No. 4; L.L. 1967, No. 2; L.L. 1974, No. 4; L.L. 1976, No. 4; L.L. 1978, No. 8.)

Sec. 40. Fixed Items.

Each department, division, city agency or other purpose shall be credited with the appropriation included in the budget for it. The appropriation for every function of each department, division, city agency or other purpose shall be a fixed item and the total expenditures

for each such function shall not exceed the appropriation therefor as originally made or increased.

The expenditures for the major objects included within each function shall not exceed the amount allocated therefor except that the director of the budget may approve in writing the reallocation of funds to or from any major object of expenditure, including personal services, within the appropriation for every function of each department, division, city agency or other purpose and may allocate the amount of any increased appropriation in like manner; provided, however, that the total expenditures for all major objects within any function shall not exceed the appropriation for such function as originally made or increased. (As amended by L.L. 1956, No. 4.)

Sec. 41. Increases Over Budget Appropriations.

The expenditures for each function of every department, division, city agency or other purpose shall be kept within the amounts fixed in the budget for each such function, except that the council may be a two-thirds vote, upon the certificate of the mayor and comptroller, showing the necessity therefor, increase the appropriation for any function to meet any contingency which could not have been reasonably foreseen when the budget was adopted, but such increase shall not be in excess of the amount specified in such certificate. Except as otherwise provided by section 29.00 of the local finance law, no [38] appropriation shall be increased for the current fiscal year after the adoption of the budget for the next succeeding fiscal year. (As amended by L. 1943, Ch. 710; L.L. 1956, No. 4; L.L. 1958, No. 3; part repealed by L.L. 1959, No. 5.)

APPENDIX (v)—Text of pertinent New York Statutory Provisions

Sec. 42. Transfer of Funds.

The council may in any fiscal year, by a two-thirds vote, on a certificate of the mayor and the comptroller showing the necessity therefor, direct the transfer of any unexpended balance of the appropriation for any function from any department, division, city agency or purpose to another department, division, city agency or purpose, provided the item or part of the item so transferred was contained in the annual budget for the current fiscal year and will not be needed by the department, division, city agency or purpose for which it was appropriated.

Money raised by tax for any particular purpose shall be applied only to that purpose except as in this section provided and any city officer who shall assist in its use for any other purpose shall be subject to removal from office. (As amended by L. 1930, Ch. 614; L.L. 1930, No. 3; L. 1943, Ch. 710; L.L. 1945, No. 5; L.L. 1956, No. 4.)

Sec. 43. Liabilities in Absence of Appropriation.

No department, division, city agency or officer shall incur any expense or liability on behalf of the city to be met by general taxation nor attempt to bind the city in any way unless there be available an appropriation for such expense or liability.

Sec. 44. Excess Expenditures Prohibited.

Each department, division and city agency and each officer thereof shall be governed by the appropriations alloted thereto in the budget or increased as in this act provided, and shall not incur any expense or liability in excess of any such appropriation as originally made or increased.

APPENDIX (vi)

Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in *Liddell v. City of St. Louis, et al.*, _____ F.2d _____

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 83-1957

Craton Liddell, *et al.*,
Plaintiffs/Appellees,

v.

State of Missouri, *et al.*,
Defendants/Appellants.

Appellant's Application for Stay; Separate Stay Requested by St. Louis County.

No. 83-2118

Craton Liddell, *et al.*,
Plaintiffs/Appellees,

vs.

City of St. Louis,
Plaintiff-Intervenor/Appellant.

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ *F.2d* _____

Appeal by City of St. Louis; Application for Stay by St. Louis County.

No. 83-2140

In Re: City of St. Louis, Paul Berra and Ronald A. Leggett,

Petitioners.

Petition for Writ of Prohibition.

Submitted: September 2, 1983

Filed: September 13, 1983

Before LAY, *Chief Judge*, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, *Circuit Judges. En Banc.*

ORDER

The State of Missouri and St. Louis County have filed applications for a stay pending appeal in opposition to a voluntary desegregation plan recently approved by the district court for the St. Louis area schools. The City of St. Louis has filed a petition for a writ of prohibition against the plan. Two objections are raised: (1) the plan imposes an interdistrict remedy based on intradistrict

violations, and (2) the plan's provisions calling for the district court to exercise authority over school tax rates under certain contingencies conflicts with the principle of separation of powers. For the reasons discussed below, we deny the applications for the stay subject to the exceptions noted, and reserve a ruling on the petition for the writ of prohibition until we hear the appeals on the merits. We express no opinion on the merits of the serious questions raised on appeal at this stage of the proceedings.

BACKGROUND

On July 5, 1983, the United States District Court for the Eastern District of Missouri approved a settlement plan calling for the further desegregation of St. Louis schools. The plan had previously been approved by the Liddell plaintiffs, the Caldwell plaintiffs, the City Board of Education, and by all twenty-three suburban school districts in St. Louis County.

The plan provides for voluntary interdistrict transfers between city and suburban schools, and includes incentives to encourage these transfers. It calls for improvement in the quality of education in the city schools, and the establishment of additional magnet schools to attract suburban white students to the city schools. It requires additional special educational improvements in the all-black schools.

The plan further provides that the state will be responsible for the costs of the voluntary interdistrict

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ F.2d _____

transfers, the magnet schools, and various part-time and alternative integrative programs, plus one-half the cost of the programs to improve the quality of education in the city schools, and one-half the cost of the capital improvements required to carry out the plan. The state is to match equally any amount raised for capital expenditures through a voter-approved bond issue to be held prior to February 1, 1984.[1] The City Board is required to pay the remaining costs.

The plan also provides that the school tax rate reduction pursuant to state law (Proposition C) will be deferred to help fund the Board's share of implementation costs. If the city still does not have sufficient revenues to implement the plan, the plan provides that "the court will enter an appropriate order, following notice and an opportunity to be heard on the amount, to increase the property tax rate in the City of St. Louis by an amount necessary to fund the city board's share of the costs of the settlement plan."[2]

[1] The district court's financial adviser found that an existing debt service levy of $ .17, scheduled to be retired in February, 1984, could support a new $20 million bond issue amortized over twenty years without an increase in property taxes.

[2] The voluntary plan emerged after months of intensive negotiations, directed by court-appointed experts, and participated in by the Liddell, Caldwell, and City Board plaintiffs, and by all twenty-three St. Louis County school districts. An agreement was finally reached after the district court disclosed, in an August 6, 1982, order, the plan it would implement in the event the parties were unable to agree to a voluntary plan and the suburban school districts were found liable for constitutional violations. The district court's proposed plan

(Footnote continued on following page)

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ *F.2d* _____

The plan is currently being implemented. School opened in several suburban districts prior to Labor Day and opened in the remaining suburban districts on September 6 and in the city schools on September 7.

DISCUSSION:

The Motion for a Stay

We noted the applicable standards for granting a stay pending appeal in *Reserve Mining Co. v. United States*, 498 F.2d 1073, 1076-1077 (8th Cir. 1974). After a careful review of the record, the applications for a stay, the opposition briefs, and oral argument, we are convinced that the applications should be denied with the exceptions noted below.

The controlling factor in our judgment is the public interest. When the public interest is weighed in conjunction with the harm to the appellants and the appellees, we feel it would be improvident to grant the stay.

First, the timing of the applications suggests we not exercise our discretion in favor of issuing a stay. The settlement plan was approved by the district court on

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(Footnote continued from preceding page)

essentially called for one unified metropolitan school district divided into four subregions with a uniform tax rate, and a metropolitan-wide student transfer transportation system.

The district court had originally set February 14, 1983, as the date for trial on interdistrict liability, but postponed this trial from time to time to allow the parties the opportunity to resolve their differences.

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ F.2d _____

July 5, 1983. Motions for a stay were filed in district court by the state and St. Louis County on July 26 and August 8, respectively. The time has simply been inadequate to permit the thorough consideration this matter requires. We will hear the matter en banc on the merits in November. By that time, the parties will have fully briefed the matter and we will have had the opportunity to consider thoroughly the record and the briefs.

Second, the school districts have already begun to implement the voluntary plan. Issuance of a stay would necessitate reassigning students and teachers, discontinuing student transportation to county schools, and revising administrative decisions concerning budgeting, orientation, and hiring. The lives of thousands of students and teachers would be disrupted before this Court had decided the matter on the merits.

The exceptions to our denial of the stay order are as follows:

(1) Paragraph 5(e) of the district court's July 5, 1983, order provides:

> (e) the State of Missouri shall pay in full the costs of transportation of the interdistrict transfer students; the reasonable, actual costs to implement incidental programs, such as the student recruitment efforts, any community involvement centers, the Voluntary Interdistrict Coordinating Council (VICC) and its staff, the Recruitment and Counselling Center and its staff and offices, and

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ *F.2d* _____

parent involvement programs; and reasonable attorney's fees that may be awarded to the prevailing plaintiffs City Board, Caldwell, and Liddell.

The provisions of paragraph 5(e) may be implemented as ordered, with the exception that the city and suburban school districts shall not further recruit or accept interdistrict transfer pupils other than those who have indicated an intention to transfer prior to the date of issuance of this order.

(2) Paragraphs 6(b) and (c) of the district court's July 5, 1983, order provide:

(b) the City Board shall submit to its voters, on or before February 1, 1984, a proposed bond issue of an amount determined by the City Board as sufficient to meet those of its capital improvement needs as are deemed necessary to meet its constitutional obligation to desegregate the City's public schools;

(c) should that bond issue fail to obtain the two-thirds majority vote required by State law, the Court will consider an appropriate order to obtain the funds deemed sufficient to meet the capital improvement needs of City Board in complying with its constitutional obligation to desegregate the City's public schools[.]

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The vote on the bond issue referred to in paragraph 6(b) may proceed as scheduled. If the issue receives the required voter approval, the bonds may be issued. If it fails to receive voter approval, the district court shall defer further consideration or action on any alternative measures to meet the capital needs of the City Board with respect to desegregation until further order of this Court.

(3) Paragraphs 6(a), (d), (e) and (f) provide as follows:

> (a) the City Board shall certify to the Court, on or before July 15, 1983, the amount needed to meet its share of the reasonable actual costs of implementing programs pursuant to the Settlement Plan, as approved, as well as the tax rate necessary to fund these costs;
>
> * * * *
>
> (d) the City Board is hereby authorized and directed not to reduce its operating levy in the City of St. Louis as of July 1, 1983, as otherwise required by Mo. Rev. Stat. § 164.013 (Proposition C). The State shall not withhold from the City Board funds that the State would otherwise withhold pursuant to Proposition C. The amount of revenue retained by the City Board by reason of not reducing its operating levy shall be utilized to fund the implementation of programs needed to meet City Board's constitutional obligation to desegregate the City's public schools pursuant to the Settlement

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Plan, as approved. Any revenue retained but not necessary to fund City Board's constitutional obligation shall be applied to reduce its operating levy on July 1, 1984;

(e) in the event the above funding orders fail to provide the necessary funds, the Court will consider an appropriate order, following notice and an opportunity to be heard on the amount, to increase the City Board's property tax rate by an amount reasonably necessary to fund the City Board's share of the costs of implementing the Settlement Plan programs pursuant to City Board's constitutional obligation to desegregate the City's public schools; and

(f) in its discretion, City Board may use other sources available to it to fund its share of the programs implemented pursuant to the Settlement Plan, as approved. To conform this order with the prior decree of the Eighth Circuit. *Liddell, supra*, 677 F.2d at 631, any outside funds received by City Board for the purpose of implementing these programs may first be applied to reduce the City Board's share of the costs of the programs and then applied to reduce the State's share of the costs of the programs.

The Board has hereto made the certification required by paragraph 6(a). The provisions of paragraph 6(d) may be implemented as ordered. The provisions of paragraph

APPENDIX (vi)—Order of the United States Court of Appeals for the Eighth Circuit, filed September 13, 1983, in Liddell v. City of St. Louis, et al., _____ F.2d _____

6(e) may be implemented as ordered, but the district court shall not issue any order increasing the City Board's tax rate until further order of this Court. The provisions of paragraph 6(f) may be implemented as ordered.

The Petition for Writ of Prohibition

We defer action on the writ of prohibition until such time as we consider the appeals that have been filed on the merits.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 83-625

IN THE

Supreme Court of the United States

October Term, 1983

JAMES D. GRIFFIN, The Mayor, and THE COMMON COUNCIL OF THE CITY OF BUFFALO, NEW YORK,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK; COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, *ET AL.*,
Respondents,

and

GEORGE ARTHUR, *ET AL.*; and the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Question Presented

Should this Court grant a petition to review an Opinion of the Second Circuit Court of Appeals which, while acknowledging the usefulness of additional detail, deferred to the District Court's reliance upon the unrebutted, good faith, professional representations of qualified, responsible school officials in determining the amount of additional money needed from their co-defendants (Petitioners) in order to comply with desegregation orders of the District Court previously approved by the Second Circuit?

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TABLE OF AUTHORITIES.

CASES:

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-625

JAMES D. GRIFFIN, The Mayor, and THE COMMON COUNCIL OF THE CITY OF BUFFALO, NEW YORK,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK; COMMUNITY ADVISORY BOARD FOR BILINGUAL EDUCATION OF BUFFALO, *ET AL.*,
Respondents,

and

GEORGE ARTHUR, *ET AL.*; and the NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

The Facts

Petitioners "Statement of the Case" grossly misrepresents the record in several respects.[1] Since Petitioner's exaggerations and inaccuracies do not relate to the basis for the decision of the Circuit Court we shall not at this time restate the facts. For the purposes of this response we rely upon the facts as related by the Second Circuit (App. 3a *et seq.*).

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[1] For instance, the record does not contain "... lists of potential cuts ..." (totaling more than $22 million) "... which cuts could be made without interfering with any desegregation order of the court ..." (Petition page 11). Nor did anyone testify "... that the $7.4 million figure was selected by Trial Counsel ..." (Petition pages 9 and 10), or that Counsel instructed "... that the O & M request should be $156.5 million ..." (Petition page 12), or that the Board's "Budget analysts" recommended an O & M Budget of $150.5 million (Petition pages 12 and 21). Further there is nothing in the Opinion being appealed from which directs Petitioners to appropriate additional tax revenues to pay for an "interdistrict" remedy (Petition pages 24 and 25); and nothing in the record to support Petitioner's assertion that "... The extra millions of dollars were to be used to 'entice' or lure suburban non-district students into the City district, ..." (Petition page 25). These and other inaccurate portrayals are apparent even by examination of the references supplied by Petitioners. Whether or not intended to be misleading, they are; even as is the reference by Petitioner (Petition page 24) to the Second Circuit's denial of a stay in a context which gives the appearance that the quoted language immediately following was uttered by the Court when the stay was denied.

Reasons for Not Granting the Petition

As more fully developed below this is simply a case of one defendant being unwilling to appropriate available funds to another defendant because it did not approve of the manner in which the latter defendant was complying with the school desegregation orders of the U.S. District Court.

Based upon a review of the evidence presented to the trial court the Second Circuit Court of Appeals was absolutely justified in holding that:

> We cannot say that the District Court erred in accepting the Board's scaled-down estimate that $7.4 million additional funds were needed. Even with this addition, the Board's budget was approximately $5 million less than its $162 million request (App. 13a).

The Second Circuit has reviewed elements of this litigation four times since 1976. Twice this Court has denied certiorari. The District Court Chief Judge John T. Curtin has been the trial judge in this matter since its inception in 1972. There is no cause for this Court's supervision.

The attempt by Petitioners and Amicus City of St. Louis to demonstrate a conflict between appellate Courts by equating an Eighth Circuit ruling on a motion for stay to the Second Circuit's judgment on the merits is illustrative of the extent to which the bounds of credulity have been expanded by Petitioners in a desperate effort to avoid the simple conclusion that no complex principles of law are here involved. In the lower Courts this matter was decided consistent with the evidence presented.

ARGUMENT

I

The Decision Below is Clearly Correct

In anticipation of further disputes between these co-Defendants the Second Circuit observed that the District Court in the future "... may find it useful to enlist the aid of a neutral auditor, experienced in school budgeting, to assist in analysis of the figures presented" (App. 13a). The absence of such analysis was *not* an obstacle to affirmance of the District Court, however, because Associate Superintendent Murray was "... very specific in detailing the cuts he believed would have to be made without the added funds"; and "... Chief Judge Curtin found that the Board's federal funding would decrease by more than $10 million. And at the same time that the Board was receiving less federal funds, it was obliged to expend additional money to comply with obligations for the education of handicapped and Spanish-speaking children." (App. 13a). According to the Second Circuit Court:

> These developments support the District Court's conclusion that the City's initial appropriation ... would not enable the Board satisfactorily to proceed with implementation of Phase *IIIX* (App. 13a, 14a).

Nothing was presented by Petitioners to rebut the testimony of Mr. Murray. Nor did Petitioners seek before Chief Judge Curtin to challenge the need for high quality education programs as a part of the attraction to magnet school and other school desegregation techniques being implemented by the school district.

As recognized by the District Court and specifically noted by the Second Circuit:

> "... it is more costly to achieve desegregation through a plan that relies heavily on the voluntary preferences of parents to send their children, White and Black, to high quality schools, than simply to pay for the bussing of children to distant schools. The Buffalo Board of Education deserves commendation for the course it is pursuing, and the District Court has not erred in determining that in 1982-83 it needed an *additional* 7.4 million to *continue its progress.*" (emphasis supplied) (App. 15a, 47a).

Thus, the decision of the Second Circuit Court of Appeals was based upon the unrefuted facts found by the District Court as they related to the 1982-83 school desegregation program. Those facts were clear enough to cause the District Court to conclude and to cause the Circuit Court to affirm the need for at least 7.4 million *additional* dollars.

II

There is No Conflict of Decisions

Neither Petitioners nor Amicus, City of St. Louis disclose any decision of this Court or any other Court which is in conflict with the opinion of the Second Circuit.

Petitioners' attempts to portray a "partial" and/or a "potential" conflict between the Eighth Circuit order in *Liddell, et al. v. City of St. Louis,* No. 83-2118 Eighth Circuit, September 13, 1983 (App. 96a) and the Second Circuit growing out of the Eighth Circuit's stay of "... any order increasing the City Board's tax rate ..." (App. 105a) must fail on a comparison of the facts.

There is no issue here of the taxing authority or level of taxes to be imposed upon Buffalo citizens. No such

issues were raised in the Courts below. Petitioners were not ordered, nor did they find it necessary, to raise taxes in order to provide the $7.4 million additional required by the opinion of the Second Circuit. Nothing in the order of the District Court or the opinion of the Second Circuit can be construed as a "tax order" (Amicus brief pp. 2 and 3) (App. 100a-105a).

The facts here do *not* present an opportunity for the Court to revisit *Griffin v. County School Board*, 377 U.S. 218 (1964); *Milliken v. Bradley*, 418 U.S. 717 (1973) and 433 U.S. 267 (1977); or *Hills v. Gautreaux*, 425 U.S. 284 (1976). Whether or not such opportunity will arise following the *en banc* opinion of the Eighth Circuit in *Liddell* is speculative (See Amicus brief footnote 2 page 8) but is not dependent upon or related to disposition of the instant petition.

III

There is No Important Question of Federal Law

This case grows out of what at the time was the most recent funding dispute between two defendants. One defendant (Board) has the responsibility and authority to come forward with and to make work "now" a desegregation plan acceptable to the District Court. The other defendant (Petitioner) has control of the purse strings.

One defendant (Board) has exhibited such good faith in meeting its obligations that both the Circuit Court and the District Court have forthrightly acclaimed it (App. 9a, 15a, 21a, 22a, 30a, 32a, 33a).

There is no question that Petitioners had the ability to pay more money toward the desegregation plan implementation. Petitioners have not asserted an

inability to pay; nor has there been any challenge by Petitioners to the finding by Chief Judge Curtin that:

> The Mayor's task as codefendant in the lawsuit was to familiarize himself with the needs of the Board, vis-a-vis, the desegregation program. He should have affirmatively inquired as to what was necessary, what the program entailed, what were the Board's needs with regard to those programs mandated by other court orders and by the state and federal regulations. The focus of his inquiry should have been: *how much money is necessary to enable the Board to carry out the mandates of this court and its other commitments*? *It is clear from the testimony that the Mayor failed to make any such inquiries* (emphasis supplied) (App. 50a).
>
> The record indicates that, except for attending the formal presentations made by Mr. Murray and Mr. Reville during the public hearings, *neither the Mayor nor any member of his staff made an effort to ascertain exactly what was needed to carry out the desegregation orders.* That the Mayor could have obtained the information is evident from prior events in the case (emphasis supplied) (App. 50a).
>
> Nowhere in his consideration is there any indication that the Mayor took into account the specific needs of the Board regarding the increased cost of complying with the desegregation order in the face of dwindling federal funds and the need for increased funds to comply with this court's orders in the *Andres* and *Bushey* cases regarding handicapped children (App. 55a).

Thus, the granting of this petition would enable the Supreme Court only to raise the "squabble" between the Mayor and the Board of Education to an unwarranted level with no benefit to distant litigants extant or potential.

As already directed by the District Court and the Second Circuit the co-defendants in this matter must find a way to resolve their funding disputes and end the role of the Courts (App. 15a, fn. 17, App. 66a). But *if* there is recurrence the Second Circuit has already determined a method by which these parties may more specifically delineate the equity of their positions:

> When the School Board seeks the aid of the District Court in ordering the appropriation of additional funds to comply with a court-ordered remedy, it will normally be helpful to see precisely how the Board would expect to spend the level of funding it asserts is inadequate. Such a presentation would reveal not only the items the Board expects to drop from its initial budget estimate, but also the items it expects to retain. No doubt such a presentation would afford the City officials an opportunity to level specified criticisms at various expenditures the Board proposed to make, but such criticisms are not the equivalent of a power to "dictate" the manner of spending. Instead, they simply afford the District Court, and a reviewing court, a focused opportunity to determine how much of the Board's additional request is justified. Whether or not the Board persuades the Court that all or a portion of the requested funds are needed, it is not bound to accede to the City's objections concerning specific expenditure items.
>
> Should a dispute of this nature recur, we think it will normally be helpful if those who seek a court order for additional funding, and those who oppose such an order, supply the District Court with considerable detail reflecting the proposed expenditures in the absence of the additional funds claimed to be needed. Faced with such presentations, the District Court may find it useful to enlist the aid of a neutral auditor, experienced in school budgeting, to assist in analysis of the figures presented (App. 12a, 13a).

Whether or not such dispute settling or dispute clarifying technique should be used or will work for these parties in their circumstance is obviously not an important question of federal law.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be denied.

January, 1984

Respectfully submitted,

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No. 83-625

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES D. GRIFFIN, etc., et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF BUFFALO, NEW YORK, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the inherent limitations on the equitable powers of the federal courts preclude orders mandating state and local governments to provide substantial sums of public money to a board of education for the purpose of funding educational programs in the context of desegregation remedial decrees, in the absence of findings by the district court, supported by clear and convincing evidence, that the programs in question will in fact remedy the specific condition offending the constitution or an identifiable effect of the constitutionally offensive condition?

2. Whether a district court can direct appropriation of substantial additional funds by a local government for use by a school board purportedly to carry out a school desegregation decree, primarily on the basis of the "good faith" of school authorities?

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No. 83-625

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BRIEF FOR CITY OF ST. LOUIS, MISSOURI, AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is presented for the City of St. Louis, a political subdivision of the State of Missouri, and is sponsored by the authorized law officer of the City of St. Louis. The brief is filed pursuant to Supreme Court Rule 36.4. The petition for writ of certiorari supported by the City as amicus curiae was docketed on October 12, 1983, and this brief is filed within the time allowed for filing a brief in opposition to the petition.

INTEREST OF AMICUS

The City of St. Louis ("amicus City") is a plaintiff-intervenor in an interdistrict school desegregation case now pending in the United States District Court for the Eastern District of

Missouri, *Liddell* v. *Board of Education of the City of St. Louis*. As a county and as a constitutional charter city under the law of Missouri, amicus City and its officers are responsible for preparing and distributing tax bills, and collecting property tax bills within city boundaries, including property taxes levied independently by the Board of Education of the City of St. Louis, an autonomous political subdivision. Amicus City and its officers also defend against tax protest suits filed under the law of Missouri.

On July 5, 1983, the district court entered a judgment and order approving a settlement agreement purporting to resolve the interdistrict school desegregation claims in *Liddell* v. *Board of Education*, see 567 F.Supp. 1037 (E.D.Mo. 1983). The agreement was conditional upon entry of an order by the district court which established adequate funding for the obligations of the parties. The formula prescribed in the settlement shall be paid by a combination of State funding and a tax rate increase in the City of St. Louis.[1] *Id.*, 1052. The State of Missouri did not consent to the settlement; under Missouri law, the Board of Education of the City of St. Louis lacked authority to enter into district court. *In re City of St. Louis, et al.*, No. 83-2140, 8th Cir. See Appendix (vi) to petition for writ of certiorari, p. 96a. Partly in response to amicus City's petition for prohibition, the Court of Appeals has stayed further action by the district court in respect to property taxes. *Id.*, 105a. Argument of various appeals and the petition for prohibition is set before the Court of Appeals en banc on November 28, 1983.

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[1] Cost estimates for the first year of the settlement ranged from $37,000,000 to $87,000,000. 567 F.Supp. 1051. Evidence presented to the district indicated that aggregate cost over five years would be nearly $1,000,000,000. However, the district court entered its orders affecting property tax rates and compelling massive State funding without entering any findings concerning the cost of the settlement agreement, or the relationship between the terms of the settlement and any existing constitutional violations.

In addition to its direct involvement in the *Liddell* litigation described above, amicus City is frequently itself the target of remedial decrees fashioned by federal courts for constitutional violations, or of actions seeking such relief. Consequently, amicus City is vitally concerned with the scope of federal judicial intrusion into taxation and spending by state and local governments.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE IT RAISES SERIOUS QUESTIONS OF NATIONAL IMPORTANCE INVOLVING THE STANDARDS WHEREBY FEDERAL DISTRICT COURTS FASHION AND IMPLEMENT REMEDIES FOR CONSTITUTIONAL WRONGS, INVOLVING CONTINUAL FEDERAL JUDICIAL INTRUSION INTO THE FISCAL AFFAIRS OF STATE AND LOCAL GOVERNMENTS TO DIRECT THE RAISING OR EXPENDITURE OF SUBSTANTIAL SUMS OF PUBLIC MONEY.

The instant case represents one of the latest episodes in a developing story of the exercise of the power of the purse by the federal judiciary. See generally Frug, *The Judicial Power of the Purse,* 126 U.Pa.L.Rev. 715 (1978); Eisenberg & Yeazell, *The Ordinary and Extraordinary in Institutional Litigation,* 93 Harv.L.Rev. 465 (1980); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 Stan.L.Rev. 661 (1978); Comment, *Enforcement of Judicial Financing Orders,* 59 Geo.L.J. 393 (1970). This Court has frequently addressed the essential predicate for exercise of the equitable powers of federal courts in fashioning remedies for constitutional violations. E.g., *Dayton Board of Education* v. *Brinkman I,* 433 U.S. 406 (1977); *Milliken* v. *Bradley II,* 433 U.S. 267 (1977); *Hills* v. *Gautreaux,* 425 U.S. 284 (1976); *Milliken* v. *Bradley I,* 418 U.S. 717 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). However, to date this Court has

not expounded precise standards governing when and how the equitable powers of the federal courts can be employed to provide additional public money at the behest of constitutional violators for the purpose of effectuating remedial decrees. In particular, this Court has not yet laid down controlling standards concerning burden of proof, degree of deference to state and local authorities when those authorities are in disagreement, and the permissible degree of intrusion by federal courts into the appropriations and taxing process of state and local governments in order to increase public funds available for remedial decrees. Amicus City submits that the time to do so has long since come, and that the instant case presents an opportunity to address these serious and important national questions.

Cases in which federal courts have decreed remedies for constitutional violations by state and local governments are legion, and involve massive changes in schools, prisons, public hospitals, and other local public institutions. See Frug, *supra*. Increasingly, these remedial decrees entail more than the restructuring of existing programs or operations, or the reallocation of existing resources to ensure that all are equally treated; rather, they entail the creation of vast new programs, necessitating the expenditure of large sums of public money, invariably thought by the local bureaucracy involved to be well beyond the existing means of the violator. Consequently, the demands upon federal courts to supervise the allocation or reallocation of scarce resources among competing governmental entities, or departments within governmental entities, are also increasing. Given the trend of continual expansion of the concept of remedies and wrongs in "institutional litigation" in federal courts, there is little likelihood that federal judicial activity in this realm will diminish in the foreseeable future. Moreover, as was astutely observed to the court of appeals at oral argument, local bureaucracies have been alert to manipulate the federal judicial process to gain what could not be achieved through the political process, under the guise of implementing a federal remedial decree. See petition for certiorari,

appendix (i), 8a. This bureaucratic opportunism represents a serious threat to the continued viability of state and local fiscal procedures, and calls for prompt attention by this Court in devising standards which will carefully restrict federal judicial intrusion into this sensitive area. Cf. *San Antonio Reorganized School Dist.* v. *Rodriquez,* 411 U.S. 1 (1973).

In the instant case, it is evident that the district court, affirmed by the court of appeals, misallocated and misperceived the burden of proof on the issue before it, and wholly failed to provide appropriate findings to warrant the overruling of the budgeting judgments made by petitioners. Both the opinions of the district court and the court of appeals make clear that the good faith of the educational authorities involved was crucial to their determination that petitioners could be required to allocate more money to the Buffalo public school system. Moreover, it is clear that the district court was animated by concern for the funding of programs in the Buffalo public schools which were unrelated to its desegregation decrees. Finally, neither the district court nor the court of appeals appears to have required a demonstration that particular programs for which funds were demanded by the Buffalo public school authorities (respondents here) were in fact related to an identifiable condition offending the constitution, or an identifiable effect of a demonstrated unconstitutional condition.

This Court has repeatedly emphasized that the fashioning of remedial decrees is the task of the district courts in the first instance, and that, in functioning to remedy unconstitutional conditions, adequate findings of fact, in conformity with Rule 52, F.R.Civ.P., are crucial. See, e.g., *Dayton Board of Education* v. *Brinkman I, supra;* cf. *International Salt Co.* v. *United States,* 332 U.S. 392 (1947). Careful factual inquiry, followed by careful tailoring of remedies to violations, is especially critical when a district court is asked to exercise the power of the purse—a power which many would deny to the judiciary. Cf. *The Federalist,* No. 47, p. 324 (Cooke ed. 1961). In this case,

the court of appeals recognized that the district court's memorandum fell short of the requirements of Rule 52 and provided an inadequate basis for the exercise of remedial power. See petition for certiorari, appendix (i), 10a-11a. Nevertheless, the court of appeals affirmed, actuated by deference to "the good faith representations of the school authorities." *Id.*, 10a. Surely this was error.

In cases such as these, it is urgent that the burden be placed upon the plaintiffs, or the governmental entity seeking additional funds, to show by clear and convincing evidence, first, that the need for additional funds is directly related to the curing of a constitutionally offensive condition, cf. *Milliken* v. *Bradley II, supra,* 433 U.S. 286 n. 17; second, that the resources available to the applicant are inadequate to implement the remedy proposed, without regard to other demands placed upon the applicant by conditions unrelated to the constitutional violation; and, third, that no other reasonable alternative to judicial action exists. Cf. *Evans* v. *Buchanan,* 447 F.Supp. 982 (D.Del.1978), rev'd in part, 582 F.2d 750 (3d Cir. 1978), cert. denied sub nom. *Delaware State Bd. of Education* v. *Evans,* 446 U.S. 923 (1980), on remand, 468 F.Supp. 944 (D.Del. 1979); *Plaquemines Parish School Bd.* v. *United States,* 415 F.2d 817 (5th Cir. 1969). The good faith of the educational authorities in devising the plan or program for which additional funds are sought is, and ought to be, utterly irrelevant when they are the ones demanding judicial intrusion into fiscal affairs. Cf. *Morgan* v. *McDonough,* 689 F.2d 265, 280 (1st Cir. 1982). The deference of federal courts to state and local authorities in devising remedies certainly must be tempered when those authorities are in disagreement among themselves.

Neither the courts nor educational authorities should feel free to ignore fiscal reality in seeking to remedy constitutional violations. Although lack of funds does not excuse compliance with the constitution, the duty to remedy constitutional violations should not carry with it carte blanche on the fisc. Cf. *Pennhurst*

State School & Hospital v. *Halderman*, 101 S.Ct. 1531, 1545-46 (1981). If there is any truth to the oft-repeated dictum that the federal courts do not sit as super-legislatures, see *San Antonio Independent School Dist.* v. *Rodriquez, supra*, it would seem that financial disputes between governmental entities or agencies should not ordinarily be resolved in federal district courts. If sufficient funds are not available to operate a school district free from discrimination, it would seem that the role of the federal court should be limited to enjoining continuation of operation of the school district unless funds are provided or can be raised to operate in conformity to the constitution. Cf. *Palmer* v. *Thompson*, 403 U.S. 217 (1971).

Of course, amicus City recognizes important differences between this case and *Liddell* v. *Board of Education*, 567 F.Supp. 1037 (E.D.Mo. 1983), appeals and petition for writ of prohibition pending. However, there is a very significant similarity between the approaches taken by the district courts in both cases.[2] Neither troubled itself to make adequate findings of fact to demonstrate that the expenditures decreed by it were related to a condition offending the constitution.[3] See *Oliver* v. *Kalamazoo Bd. of Ed.*, 640 F.2d 782 (6th Cir. 1980). An unwarranted

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[2] Of course, the existence of a conflict between the decision of the Court of Appeals for the Second Circuit in this case and the likely decision of the Court of Appeals for the Eighth Circuit in *Liddell* remains speculative at this time. Amicus City fervently hopes that the latter court will reverse the order of the district court in *Liddell*. Nevertheless, the pendency of *Liddell* lends additional impetus to the need for certiorari in the instant case. Absent explication of stringent standards controlling the district courts in seeking to exercise the power of the purse, unconscionable intrusions into state and local appropriations processes and even taxation can be expected to multiply.

[3] Amicus City also recognizes that petitioners, or at least the common council of the city of Buffalo, were found liable for contributing to illegal segregation of the Buffalo public schools. *Arthur* v. *Nyquist*, 415 F.Supp. 904, 429 F.Supp. 206 (W.D.N.Y. 1976-77), aff'd in part and rev'd in part, 573 F.2d 134 (2d Cir.), cert. denied, 439 U.S. 860

assumption is made by both courts that once a violation is found, any program designed to improve educational quality is a permissible part of the remedy and any funds needed for the remedy must be "new" funds, i.e., additional funds above and beyond existing revenues or appropriations. Such approaches to judicial exercise of the power of the purse cannot be countenanced, lest the federal district courts become the ultimate and perpetual arbiters of the budgets of state and local governments. Only this Court can administer the necessary antidote by reviewing and reversing the court of appeals in this case.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS, REGARDING THE MANNER AND MEANS OF FEDERAL JUDICIAL INTRUSION INTO THE FISCAL AFFAIRS OF STATE AND LOCAL GOVERNMENTS IN THE CONTEXT OF FASHIONING AND IMPLEMENTING REMEDIAL DECREES.

The conflict between the approach taken by the court of appeals in this case, and the approach mandated by this Court in *Milliken* v. *Bradley II, supra,* and *Dayton Board of Education* v. *Brinkman I, supra,* is manifest. Detailed findings of fact are wholly lacking to justify the reallocation of petitioners' resources on the scale undertaken by the district court and affirmed on appeal. Far from exhibiting "an unusual character," cf. *Milliken* v. *Bradley II, supra,* 433 U.S. 296 (POWELL, J., concurring), cases such as this are becoming the norm. This

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(1978). However, it is clear that the district court decision at issue here did not rely on or attempt to link the funding ordered to petitioners' proven liability, any more than it was found to be directly related to any other condition caused by a constitutional violation. It would seem that, on the present record, the appropriation decision of petitioners should be entitled to a presumption of constitutionality. Cf. *Evans* v. *Buchanan, supra.*

Court can no longer ignore the tendency of district courts to engage in broad "social experiments," cf. *Liddell* v. *Board of Education, supra,* 567 F.Supp. at 1041, under the guise of implementing desegregation remedies. Here, as in *Liddell,* the district court's findings simply do not justify the remedy imposed. *Dayton, supra,* 433 U.S. at 414. Further, the district court clearly failed to take into account "changed circumstances" of both petitioners and the Buffalo public school system, when it decided to reallocate over seven million dollars in petitioners' budget. This approach seemingly conflicts with the rules enunciated in *Pasadena City Bd. of Education* v. *Spangler,* 427 U.S. 424 (1976) regarding administration of remedial decrees. It is apparent that changes in availability of revenue must be taken into account by district courts in superintending desegregation of schools.

The decision of the court of appeals in this case also directly conflicts with the decision of the Court of Appeals for the Third Circuit in *Evans* v. *Buchanan, supra,* the decision of the Sixth Circuit in *Oliver* v. *Kalamazoo Bd. of Ed., supra,* and the decision of the Eighth Circuit in *United States* v. *Board of Education of City of Chicago,* ____F.2d____ (Sept. 9, 1983).

The court of appeals in the instant case wholly ignored the duty of the Buffalo Board of Education to give priority in its budgeting to the demands of school desegregation decrees, as required by *Evans.* Instead, the court of appeals appears to have approved the concept that school authorities are entitled always to seek fresh funds to implement desegregation decrees, and need not demonstrate that existing resources are inadequate before securing funds through judicial decree. The court of appeals also ignored the elementary principle, followed by the Sixth Circuit in *Oliver,* that "cognitive and behavioral ancillary programs" are appropriate only if shown to be constitutionally necessary, with the burden of proof falling on the remedy's proponents. Finally, the court of appeals here simply gave no thought to considerations of comity, unlike the Seventh Circuit

in *United States* v. *Bd. of Education of City of Chicago, supra.* On the contrary, the court of appeals authorized the district court to disregard budget decisions made by petitioners, and to rely almost entirely on the ipse dixit of the Board of Education and on the status of petitioners as "defendants," though without reference to the scope of their liability, if any. Clearly, there is more to comity than automatic deference to the local educational authorities.

Because the decisions of the district court and the court of appeals in this case depart from even the general standards laid down in *Milliken II* and *Dayton I, supra,* and conflict with the decisions by the Third, Sixth and Seventh Circuits in matters relating to funding disputes and federal remedial decrees, it is desirable that this Court grant certiorari to review and correct the judgment of the court of appeals herein.

CONCLUSION

Although this Court has repeatedly emphasized the inherent limitations on the equitable powers of the federal courts, and has repeatedly demanded that remedies be tailored to the scope of constitutional wrongs, it is plain that these standards have not sufficed to confine the federal district courts to the proper sphere of judicial activity. In particular, the "unusual" case of *Milliken* v. *Bradley II, supra,* has spawned numerous school desegregation cases in which the federal courts are asked continually to intrude into the fiscal operations of state and local governments on a massive scale, to finance "quality education" programs. More often than not, these programs have little if anything to do with a demonstrable inequality between racial groups attributable to identifiable constitutional violations. Instead, they are elements of broad social experiments or, more frequently, bureaucratic maneuvering to manipulate the federal judicial process in aid of local struggles over scarce public funds. The time has come for this Court to intervene and limit federal exercise of the power of the purse to those cases where

such action is clearly needed to remedy an identifiable unconstitutional condition, or a demonstrable effect of a constitutional violation. Precise standards concerning burden and quantum of proof will do much to moderate the sort of disruption of the federal system evinced by this case. Accordingly, certiorari should be granted, and the judgment of the court of appeals should be reversed.

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